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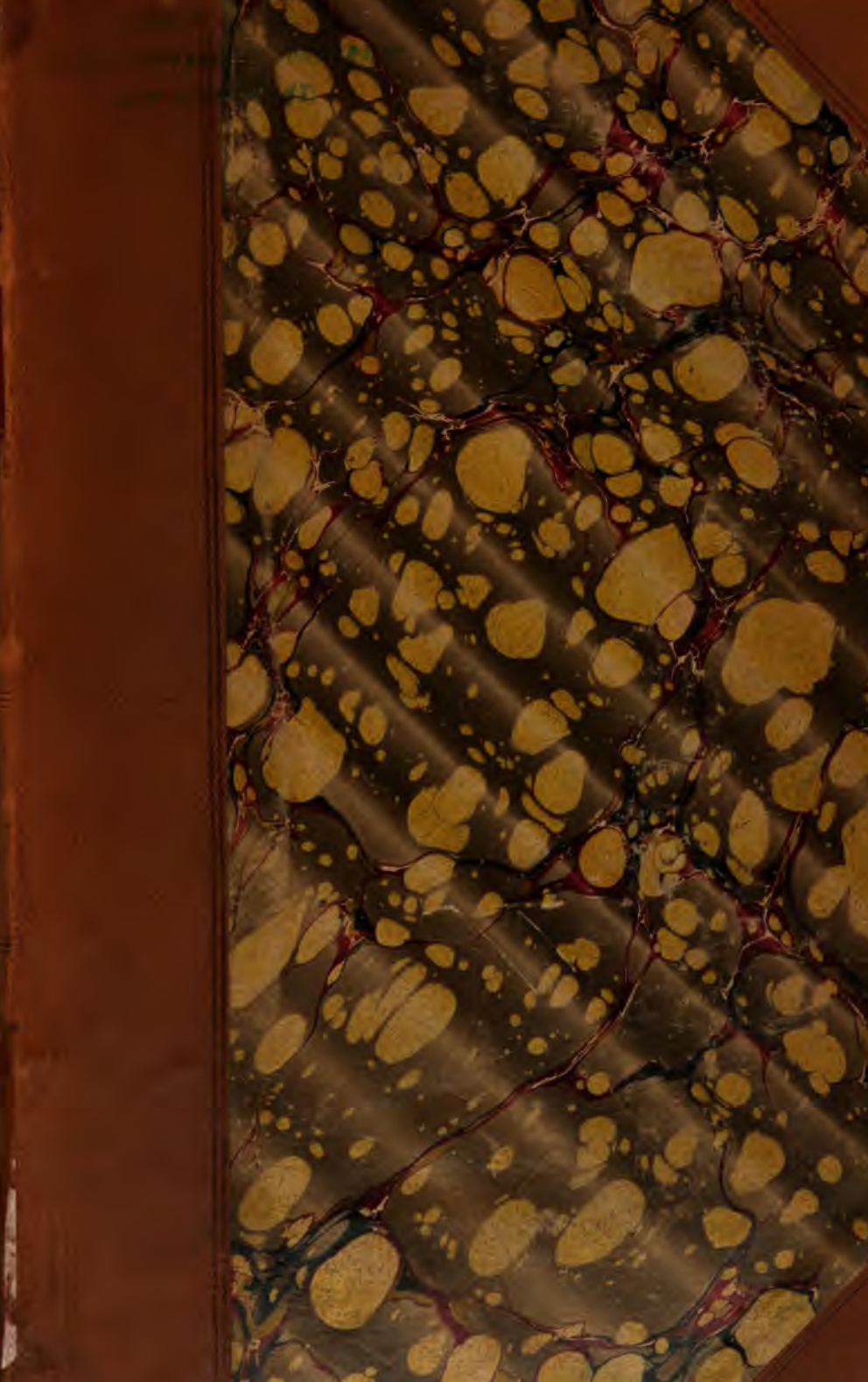
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English Reports
Periodicals



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OR
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THE LAW MAGAZINE.

ART. I.—DEFECTS OF THE CRIMINAL LAW.

A Treatise on the Admissibility of Confessions and Challenge of Jurors in Criminal Cases in England and Ireland. By Henry H. Joy, Esq., Barrister at Law. Andrew Milliken, Dublin; Stevens and Norton, and A. Maxwell and Son, London. 1842.

THE suppression of crime is the common interest of all mankind; and this purpose is best effected by rendering, as far as possible, detection inevitable, and punishment certain in event, definite in degree, speedy in execution, proportioned to the offence, and in accordance with the state of public opinion for the time being. But though these principles are acknowledged as theoretically true by all thinking men, they are not practically applied to the criminal jurisprudence of any country in Europe. Our comments in this article will be confined to the Penal Law of England, of which we intend to point out some of the leading defects, and to suggest, as well as we are able, the fitting remedies; and even our merely practical readers will, we hope, find the subject, as we propose to treat it, by no means wanting in either interest or instruction.

The first objection we shall make to the mode of conducting criminal trials in England is the extreme and useless precision required in drawing the indictment. Let a name be misspelt, or the sex of an animal misstated, or any other trifling mistake occur in what is technically called a "material averment," and though the crime be proved to demonstration, the delinquent escapes. When Ambidexter Ignoramus, the satirical representative of common lawyers, is made to exclaim, "Oho, hic est defalta literæ; emenda, emenda, nam in nostrâ lege una comma evertit totum placitum,"—the merry author knew full well that the liveliest fancy could imagine nothing more bitterly

sarcastic than this expression of the naked truth. The natural consequence of such overstrained accuracy is, that the condemnation or acquittal of the prisoner depends, not on his intrinsic guilt or innocence, but on the care or negligence of the clerk of arraigns, or the accidental circumstance of his obtaining an inexperienced or a skilful advocate. One or two examples will illustrate this position.

In 1838, one Ratcliffe, a bankrupt, was charged with felony in concealing his property, with intent to defraud his creditors. He was found guilty, and sentenced to transportation for seven years. The offence had been created by the Bankrupt Act; but the indictment, though it averred that the prisoner, "not regarding the laws and statutes of this realm, nor the pains and penalties therein contained, feloniously did conceal," &c. accidentally omitted the formal allegation, that the crime had been committed "against the form of the statute in such case made and provided." An objection was thereupon raised by the prisoner's counsel, and the point being reserved for the opinion of the judges, they held the omission fatal to the indictment, and the prisoner was in consequence discharged. 2 Lewin, 57; 2 Moo. 68, S. C.; and same point, *Rex v. Pearson*, 1 Moo. 313.

In the following year, at Chelmsford, a married woman named Biss was indicted for drowning "an infant male child, aged about six weeks, and not baptized." The fact that she had murdered her own son was clearly proved: the verdict was "guilty," and the sentence "death." A gentleman at the bar, in arrest of judgment, objected to the indictment, urging that it did not appear therein whose child had been murdered; that the infant was not described by any name; that the averment that he was "not baptized," accounted for the omission of the Christian name only; that if the indictment was intended to apply to the prisoner's own child, the name Biss should at least have been inserted, since, being born in wedlock, the boy had from his birth the surname of his parents; that on this general charge the prisoner might have been convicted of murdering the child of any person in court, or any person in the country. Lord Abinger, who tried the case, reserved the point for the consideration of the judges, who unanimously held the objection valid, and the prisoner

was liberated at the following assizes. 2 Moo. 93; 8 C. & P. 773; and MS. S. C.

Again : at the late trial of Lord Cardigan in the House of Peers, the technical difficulty was simply this. The indictment charged his lordship with feloniously shooting "Harvey Garnett Phipps Tuckett;" but the counsel for the prosecution failed to prove that these names belonged to the party wounded. The result is well known.

Similar instances might be cited usque ad nauseam ; indeed no circuit passes without numerous objections being urged equally beside the real merits of the case, by the success of which the ends of justice are disgracefully frustrated, and our penal jurisprudence becomes a subject of merited contempt and ridicule, not only to men of education, but to the middling and even the lowest classes throughout the country. Should this system continue? The non-punishment of the individual offender is its least evil result. His unmerited success emboldens him to pursue headlong the career of guilt, since the impunity of a first offence becomes a natural premium for the commission of a second ; while the fatal precedent of the escape of one criminal leads ten more to follow his example, in the shamefully well-founded hope of sharing his good fortune.

Nor is this all. In proportion as the present system encourages in their deeds of evil the profligate and abandoned, does it work irreparable wrong to the really honest. Technical objections prevail to such an extent, that a verdict of acquittal is no longer presumptive of innocence. If a man be so unfortunate as wrongfully to be charged with the commission of a crime—and who is there that may not be so charged?—his character is now blasted for ever. "His acquittal *may* have been the result of some legal error," whispers suspicion. "Probably it *was*," mutters malice; while busy rumour cruelly repeats the fatal assertion throughout the neighbourhood of his home.

The simple remedy we propose for this incalculable evil is to extend to *all* criminal cases the powers of amendment given to the judges by the acts of 9 Geo. 4, c. 15, and 3 & 4 Will. 4, c. 42, ss. 23 & 24. By the former of these acts, every Court of Record in civil actions, any judge at Nisi Prius, and any

Court of Oyer and Terminer and General Gaol Delivery, may cause the record on which any trial may be pending in a civil action, or in an indictment or information for any *misdemeanour*, when a variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record, to be forthwith amended in such particular as such judge or Court shall think reasonable; and thereupon the trial shall proceed as if no such variance had appeared. By the latter act, any Court of Record in civil actions, or any judge at Nisi Prius, may cause the record, writ, or document, on which any trial may be pending in a civil action, or in an information in the nature of a *quo warranto*, or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital on the record, &c. of any contract, custom, prescription, name, or other matter, in any particular, in the judgment of such Court or judge *not material to the merits* of the case, and *by which the opposite party cannot have been prejudiced in the conduct* of his action, prosecution or defence, to be forthwith amended by some officer of the Court or otherwise on such terms as the Court or judge shall think reasonable: and in case such variance shall be in some particular, in the judgment of such Court or judge, *not material to the merits of the case, but such as that the opposite party may have been prejudiced* thereby in the conduct of his action, prosecution or defence, then the same may be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial, as such Court or judge shall think reasonable. The 24th section provides, that in doubtful cases the judge, avoiding the responsibility of deciding, may direct the jury to find the facts according to the evidence, and leave the question of the materiality of the variance for the consideration of the Court above.

We are aware that in proposing this alteration in the criminal law, we have to combat a vast array of specious reasoning and well-meaning prejudices. First, it will be urged, that as strict precision and accuracy have for ages been required in the drawing of indictments, no laxity must now be introduced, and our opponents will appeal to the wisdom of our ancestors; but this argument proves too much, since it would equally

protect and consecrate every abuse of long standing; and had such reasoning been allowed to prevail, the honourable exertions of Sir Samuel Romilly and Sir Robert Peel would have ended in disappointment, and the vast improvements in our criminal law already introduced would have been effectually strangled in their birth. It should also be remembered, that the true cause of the exceeding precision required in drawing indictments was the sanguinary nature of our punishments in former days. When above 1500 separate offences were punishable with death, when more than 60,000 persons were incarcerated in prison in one year, and when no less than 72,000 criminals were executed in a single reign, it was natural, nay laudable, that they whose hateful duty it was to preside in criminal Courts should be cunning in devices of mercy. But now that the number of capital felonies is reduced to ten, these subtleties should cease with the severity which excused them. The criminal has no prescriptive right to urge quibbles in his defence.

Secondly, it will be argued by a sickly and false philanthropy, that it is *unfair* upon the prisoner to amend or alter the original charge against him; that he should enjoy the benefit of every doubt; that, in the language of Lord Erskine, "it is the glory of the English law, that it requires in the commonest penal cases the utmost precision of charge, and a proof correspondingly precise; hitting the bird in the very eye; strictly conformable, not merely to the substance of the crime, but to the accusing letter." We shall be reminded that Horace Walpole has spoken of "the humane dignity of the law of England, whose character it is to point out *favour* to the criminal," &c. &c. Still we are not convinced by these amiable sentiments, nor awed into submission by the bright names which support them. If the prisoner be guilty, let him be convicted and punished; if indeed there be any reasonable doubt respecting the *fact*, let him, in the name of justice and humanity, be acquitted; but let no technical errors screen him from the consequences of his guilt. The language of Lord Erskine became him as an advocate, and Horace Walpole writes passably well for a man who knows nothing of the subject he discusses; but the argument of "unfairness" is ridiculous.

If a criminal were tried, as a fox is hunted, for the diversion of sportsmen, and it were an object to counsel, as it is to the huntsman, to keep up the breed in order to show sport, it might then be advisable to allow due weight to quibbling, in order to give the valuable prisoner a *fair* chance of escape ; but if crime is really to be suppressed, let the conviction of the criminal be as certain as the law can make it. To borrow a sporting phrase, it was not by *giving law* that King Edgar extirpated the wolves from England.

“ Though space and law the stag we lend,
Ere hound we slip, or bow we bend,
Who ever reck'd how, where, or when,
The prowling wolf was trapp'd and slain.”

Thirdly, it may perhaps be said, that to intrust the judges with powers of amendment in criminal cases is to give them a dangerous discretion. We confess we do not think so. The days of Judge Jefferies are gone by. In the nineteenth century, with an intelligent and watchful bar, and a jealous and powerful press, it would be impossible for any judge, even should he have the inclination, to exert these powers to the prejudice of his fellow subjects. Individual instances of difficulty might indeed at first occur, as they must in every measure of which man is the author, but we firmly believe that these would be most rare ; and this argument at least comes with bad grace from the advocates of no change ; since by the existing law the judges exercise an enormous discretion in fixing the amount of punishment. This discretion we would in fact curtail, but to avoid confusion we will say no more on the subject in this place.

Fourthly, it may also be contended that the evils of which we complain are imaginary, since a party who has been acquitted on account of a technical error may be again tried for the same offence. This is true, if at the time of the first acquittal the grand jury are not discharged ; but even in that event the proposed change has the merit of simplicity ; for without prejudicing the prisoner in the slightest degree, it effects precisely the same purpose as the present system, and thus spares the county the expense of preparing a second indictment, the grand jury the trouble of finding a

second bill, and the Court, petty jury, and witnesses the time unnecessarily bestowed in investigating anew the known circumstances of the case. The assertion is equally true that, though the Court cannot detain a prisoner after the discharge of the grand jury, yet in *strict law* he *may* be again apprehended and tried after a technical acquittal; but we answer this statement by another, viz. that he *never* is thus apprehended and tried. The practice is so strongly at variance with such a proceeding, that we very much doubt if our opponents can produce a single instance in which it has in fact been instituted.

Perhaps we shall best test the utility of this change, not by answering any more imaginary arguments, but by giving a few instances of the practical amendment of indictments, and it may here be conveniently repeated, that the powers we propose to give the judges are—1st. To amend *unconditionally* all those matters which are not material to the real merits of the case, and are such, that, by their misstatement, the prisoner cannot have been prejudiced in his substantial defence. 2d. To amend, upon such terms of postponing the trial as the judge shall deem reasonable, all those matters, which, though not material to the real merits of the case, are such that, by their misstatement, the prisoner may have been prejudiced in his substantial defence. 3d. To reserve, for the consideration of the judges, the question of the materiality of the variance.

In order to ascertain what matters such powers would reach, let us briefly consider the nature of an indictment. Now, according to Lord Hale, an indictment “is nothing else but a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature.” Its object is threefold; first, it must inform the court and jury what is the charge against the prisoner; secondly, it must give the same information to the prisoner himself; and, thirdly, it must be kept as a record of the Court, so that, should the prisoner be indicted a second time for the same offence, its production will entitle him to an acquittal. Confining our attention for the present to the first two objects, let us observe the effect of this power in the cases we have cited

above. In the case of the bankrupt, Ratcliffe, it will scarcely be urged that the formal averment "against the form of the statute" was "material to the real merits." The bankruptcy of the prisoner, and his concealment of his property with the felonious intent of defrauding his creditors, constituted these merits. Were *they* duly alleged and duly proved? They were. Then in what manner could the omission of those technical words have "prejudiced the prisoner in his substantial defence?" If indeed it were necessary in all statutable offences to specify in the indictment the particular act on which the prosecutor relies, and we by no means assert that such a law would not be advisable, there would be some ground for arguing that an indictment, which omitted the title of the statute, withheld important information, and was consequently bad; but what information can be derived from the insertion of these indefinite words, "against the form of the statute?" What statute? there are thirty-three gigantic quartos filled with statutes!

Again, in the case of Mrs. Biss, the infant's *name* was clearly not material to the real merits, and if its omission could have prejudiced the defence, the inquiry might have been postponed. So in the trial of Lord Cardigan, if the House of Peers had possessed the power of amendment, how much costly and solemn mockery might have been avoided; for one cannot fail to perceive that Lord Cardigan's real crime consisted in shooting, not at Captain Tuckett, but at a *man*, with a felonious intent. The name of the party shot was set out in the indictment for the sole purpose of particularising the offence. The averments in the indictment stated, and the evidence adduced at the trial proved, all the substantial ingredients of the crime; the firing the pistol, the wounding the man, and the felonious intent; but this variance arose between the record and the proof—the person wounded was specified in the indictment as "Harvey Garnett Phipps Tuckett," but the evidence did not clearly show that he bore these names. Still what possible objection could be urged to an amendment, which, by striking out the unproved names, and inserting the words "a certain person to the jurors aforesaid unknown," should have left the indictment in a state with which the proof should then have accorded? If, indeed, Lord Car-

digan could have shown that he was *prejudiced* by the misnomer, that he was in fact defending himself against *one* charge while the crown was prosecuting him on *another*, then, though the amendment might have been still made, as in a matter not material to the merits of the case, the trial should have been postponed for such reasonable time as would have afforded his Lordship an opportunity of preparing his possible defence : but when it was palpable to every peer who tried him that he was in no respect *misled*, that the offence charged and the offence proved was *one and one only*, and as such had been treated both by the prosecutor and the prisoner, it was a mere *legal* trifling with justice and common sense to hold that the variance was fatal. Indeed the misnomer in the indictment of the party injured can scarcely by possibility mislead the prisoner. In the great majority of cases the former is utterly unknown to the latter. Take the case of a pickpocket : he knows full well that at Good's execution opposite the gaol at Newgate he took a silk handkerchief out of a gentleman's pocket, but who that gentleman was he neither knows nor cares. It might have been Henry Richard Plantagenet Fortescue Damer, Earl of —, or plain John Snokes ; it is all one to him. The insertion of the name gives him no information ; its omission or misstatement cannot therefore prejudice his defence. The same observations apply to the common case of a shoplifter. When he steals a shawl from the counter, what does he know about the Christian name of the haberdasher, or about the number, title, or description of the sleeping or waking partners ? If the indictment told him the exact spot and hour where and when the crime was committed, he might prove his innocence by showing that at that time he was elsewhere. Some shade of reason might therefore be urged in support of particularity in averments of time and place ; but what says the law ? We quote from Mr. Archbold's able summary :—" Time and place must be added to every material fact in an indictment ; that is, every material fact stated in an indictment must be alleged to have been done on a particular day, and at a particular place."—p. 34. . . " But although time and place must thus be laid with certainty, it never was necessary it should be laid according to the *truth*."—p. 37.

Now, although we condemn the unnecessary and frivolous *repetition* of averments which may be false in fact, we admit the wisdom of allowing great latitude in all allegations of time and place; and we then contend that if such laxity is permitted in these comparatively important circumstances, why should it not be equally allowed in those which are of less consequence? So far as the trial is concerned, the indictment is sufficiently precise if it points out generally the nature of the crime with which the prisoner is charged. If it does more, it assumes the province of evidence; and it should be remembered that a prisoner does not come to his trial ignorant either of the specific charge or of the *prima facie* evidence by which that charge is intended to be supported. Previously to any bill being preferred to the grand jury, the prisoner is taken before the magistrates, when the witnesses are examined on oath in his presence. Their testimony is reduced into writing, and, on the payment of a small sum, we heartily wish we could say *gratis*, the prisoner has a right to be furnished with a copy of these depositions. He is also, at the time of his trial, entitled to inspect, without fee or reward, all the depositions taken against him, which have been returned; so that it is difficult to imagine how he can be misled by the language of the indictment, if he will only take advantage of the protection allowed him by law.

Moreover, when we remember that the great body of prisoners are illiterate persons, few of whom can afford the means of securing the assistance of counsel, it is palpable that any system which curtails the length and simplifies the form of indictments, and renders unnecessary the multiplicity of counts, must be productive of no trifling benefit to the unfortunate beings who stand at the bar of a criminal court. For what object can be witnessed more painfully ridiculous than the sight of a poor wretch, who can neither read nor write, and whose humble powers of apprehension are confounded and almost paralysed by shame and fear, yet striving in vain to collect the real charge against him from an indictment of perhaps fifty folios and twenty counts, dressed up in the most approved confusion of special pleading verbiage? Is it not treating common sense like folly, to say that such an indictment can give *any* information to such a person?

We have purposely reserved for this place the discussion of the third object of an indictment, namely, that it may serve as evidence of a previous conviction or acquittal, and be pleaded in bar of a second prosecution for the same offence. It is clear that for this purpose it is wholly immaterial whether the indictment, as originally framed, describe the circumstances of the offence with accuracy, or whether the accurate description be the effect of a subsequent amendment. So long as the record, when produced on the second trial, can show that the prisoner had been previously tried on the same charge, its object is amply attained.

When, therefore, it is urged in opposition to extended powers of amendment, that this change might prejudice the interests of a prisoner on a second trial for the same offence, we feel inclined to question, not only the soundness, but the sincerity, of the opposition; and the more so, when we consider the uncensured difficulties which, according to the existing law, accompany any attempt to take advantage of a former record. Instead of its being sufficient for the prisoner simply to plead *vivâ voce*, that at such an assizes, in such a year, he was legally tried for the same crime, and then to prove the record of the former indictment, and the identity of the offence, he must employ counsel, or at best counsel must be assigned, *Rex v. Chamberlain*, 6 C. & P. 93, to draw up and formally sign on formal parchment a formal plea, setting out with accuracy the whole of the formal record, beginning with the caption and ending with the acquittal or conviction, *Rex v. Wildey*, 1 M. & Sel. 183. The plea must then contain carefully drawn averments; first, that the judgment remains in full force and effect, and then that the offences and the parties charged with their commission are identically the same in the two indictments, and this too, though the prisoner has no *right* to a copy of the second, but can only require it to be read slowly. *Vandercomb's case*, 2 Leach, 711; *Rex v. Parry*, 7 C. & P. 836. If the counsel, as is highly probable, loses his way in this labyrinth of technicality, and makes some accidental error in the recital of the caption or in the averments of identity, the clerk of arraigns may demur, and if the Court decide in his favour, and the charge be one of misdemeanor, the judgment is final. See *Rex v. Taylor*, 3 B.

& C. 502, 612; *Rex v. Goddard*, 2 *Ld. Raym.* 922; 2 *Hale*, 256. Nor do we here magnify, for the mere purpose of argument, the difficulty of drawing a correct and safe plea of *auterfois acquit*, since we learn, by a note appended to *Sheen's case*, 2 *C. & P.* 640, that a successful plea of this kind is very unusual in practice; and it is remarkable that, though the counsel in that case were complimented by the judge for their ability in drawing the plea, and one of them, it is supposed, owes his ultimate success as a criminal lawyer in some measure to the reputation he obtained in that defence; yet the plea raised an issue singularly infelicitous, and put the prisoner to the proof of an allegation which was far more difficult to establish than that which the law strictly required.

A diverting instance of pleading *auterfois acquit*, and one which forcibly illustrates the advantage of allowing amendments, occurred a few years back at the assizes for Hertford. A man was charged with stealing "a slop." The offence was clearly proved, but when called upon for his defence, the prisoner exclaimed, "Why, my lord, it ain't no slop." "You hear what he says," said the judge, addressing the jury. "Is it a slop, gentlemen?" "No, my lord, it's a smock," said one of the jurymen who kept a huckster's shop. "Then you must acquit the prisoner." He was acquitted; but the grand jury not being discharged, a second indictment was preferred and found, charging him with stealing "a smock." Nothing daunted, he now pleaded *auterfois acquit*, and employed counsel to prepare the plea in the correct form. The trial was postponed till the following day, and counsel sate up half the night studying the authorities and drawing the plea. The averments of identity were complete, the smock and the slop "were one and the same article, and not other and different articles;" "the smock mentioned in the present indictment was known by the name of slop;" the felonies were identical, the persons charged were identical, &c. &c. The plea was demurable, but the counsel for the prosecution, not discovering the flaw, traversed the averment, that the smock was known by the name of slop. Witnesses were called on both sides, and never did surveyors on a question of valuation, or jockies in a horse cause, give more inconsistent evidence. The learned judge was quite confused; "You see, gentlemen,

the question for you to decide is whether this article is a slop or smock ; the witnesses for the prisoner swear positively, you see, that it is a slop ; they would call it a slop anywhere, they would call it a slop on the railways ; they know it's a slop : but then, you see, the witnesses for the crown are as positive that it's a smock. Now it may be a smock, or a slop, or a smock and slop ; though I should think it was rather a smock-frock, but you will have to decide, gentlemen. You see the counsel for the crown has urged that a slop means many things, and that this is not a slop, and has referred me to housemaid's slops, and to Doctor Slop, and has also alluded to mackintoshes ; but, gentlemen, I do not see what these matters have to do with the question, which is simply this. If it is a smock, you will say that it is not a slop, but a smock ; if it is a slop, you will say that it is not a smock, but a slop ; if it is a smock and slop, you will say that it is known by the name of slop ; if it is neither one nor the other, you will say that it is neither a smock nor slop. In the first event you will find for the crown, in the last three for the prisoner, you see."

The next alteration we suggest relates to the law of confessions ; and here we are well aware that many sensible men, both in and out of the profession, will, on principle, oppose our views. Still, having formed a strong opinion in favour of their correctness, we shall not be deterred from advancing them by any supposed array of intelligence in the ranks of the opposition. All we require is a candid hearing.

The present system is in substance the following :

1st, Confessions are inadmissible in evidence, where the slightest *temporal* inducement of hope or fear, *in respect of the charge*, has been offered to the prisoner by a person in *authority*, or where such inducement, though held out by a stranger, has been *sanctioned* by such person.

2dly, Confessions are inadmissible when given on *oath* before a magistrate by a prisoner at the time under a criminal charge.

3dly, All other confessions are admissible.

4thly, When admissible, it would seem they are sufficient, though uncorroborated by other testimony, to warrant even a capital conviction.

The mere perusal of the above abstract propositions will enable few men to comprehend at once the absurdities they involve; but with the view of placing these absurdities in a more vivid light before our readers, we have ventured here to subjoin two supposititious cases. We may add, that though the arguments are our own, the authorities cited in support of each proposition are not only published in the reports, but have many of them been decided by the united wisdom of the Judges; and we believe the conclusions at which we arrive will be found legally correct.

The prisoner was tried and convicted for the wilful murder of A. B. by shooting him six years before the time of the trial; but his execution was respited in order that the opinion of the Judges might be taken, whether his confession was admissible. He had originally been committed on a charge of burglary, and the chaplain of the gaol on frequent visits had earnestly exhorted him to repentance, and had warned him that eternal misery would assuredly be his portion, unless by an open confession he made peace with his Maker. An acquaintance, who had obtained a pardon by turning Queen's evidence in a case of sheep-stealing, was also frequently with him, and never failed to assure him that he would be certainly hanged if he did not confess, and as certainly be pardoned, like himself, if he did. And the gaoler on one occasion, having first made him drunk, promised, in the event of his confessing, to give him some more gin and water, to strike off his handcuffs, and to let him see his wife; and, as a further inducement, had bound himself by an oath of secrecy. The prisoner, urged by these hopes and these fears, and taken off his guard by intoxication, stated that he was in no way concerned in the burglary, but that he had shot the said A. B. at the time and place and in the manner stated in the indictment. There was no evidence of the *fact* of the murder except this confession; and the only other evidence in the case was, that the prisoner had subsequently offered a bribe to the gaoler to keep him from appearing at the trial. The Judges met at the house of the Chief Baron, and were unanimously of opinion that the conviction was right. They held, on the authority of Gilham's case, 1 Moo. 186, not indeed that the fear of *post obit* punishment was too remote to influence a man of

ordinary nerve and understanding; but that any statement made under a religious impression must be presumed to be true, and was therefore admissible. As to the advice given by the sheepstealer, they considered it utterly without weight. It was the mere opinion of an indifferent person, who officiously interfered without any kind of authority; and it was impossible that even the feeblest mind could be influenced by the idle words of such a man. And they referred to Row's case, R. & R. 153, and also to Sarah Taylor's case, 8 C. & P. 734, where Mr. Justice Patteson correctly quoted the general opinion of the Judges, that to render a confession inadmissible, there must be some inducement held out by a person *in authority*. They said that Spilsbury's case, 7 C. & P. 187, was a clear decision that the drunkenness of a party confessing afforded no ground for the rejection of the statement; and that, independently of that case, the doctrine was palpably correct law, since the truth of the maxim, "*in vino veritas*," was universally admitted. They assented to the cases of *Rex v. Green*, 6 C. & P. 655, and *Rex v. Lloyd*, Id. 393; the first having expressly decided the question as to the handcuffs, and the second as to the wife. They could not indeed conceive how this last point could ever have been mooted. Had the gaoler proposed a *separation* as an inducement, there might have been something in the argument; but the other view was preposterous. Respecting the promise of "more gin and water," they entertained some doubt. They were aware that Best, C. J., had on one occasion excluded a confession made in consequence of such a promise, *Sexton's case*, but the authority of that case had been much questioned; and they were inclined to agree (A——, J., and B——, B., *dubitantibus*.) with Messrs. Deacon and Chetwynd and other text writers, that the principle there laid down was irreconcilable with subsequent decisions, and was not law. On the effect of the oath of secrecy, they thought no reliance could be placed. Not only was it held in *Rex v. Shaw*, 6 C. & P. 372, that such an oath, however wicked, was not binding, but *Rex v. Derrington*, 2 C. & P. 418, and many other cases, with which they agreed, had established beyond dispute that no false representation made to the prisoner, or deception practised upon him, would exclude a

consequent confession, unless the inducement held out was calculated to produce an untrue statement. The only remaining point related to the necessity for corroboration; and without laying down an inflexible rule that no corroborative testimony was in any case required, the Judges were unanimously of opinion, on the authority of Falkner's case, R. & R. 481, that the confession was here sufficiently confirmed, and the prisoner was accordingly executed.

At the same meeting they also decided the following case: The prisoner was tried for shoplifting. The offence was clearly proved, but the counsel for the prosecution, ex majori cautela, put in two confessions: the first was made to the constable, but the prisoner's counsel objected to its admission, on the ground that, before it was made, some neighbours, in the presence and hearing of the policeman, had told the prisoner that "it would be better for him at the trial if he confessed the truth, as the evidence against him was clear." The second statement was the examination taken before the committing magistrate: the prisoner had been carefully warned non proderet seipsum, but the clerk of the justices had by mistake headed the writing in the formal manner of a deposition, so that it appeared, what it was not, to have been taken on oath. This was also objected to; but both objections were overruled, and the prisoner was convicted. The points being reserved, all the Judges thought that the conviction was wrong. The reasons for this decision cannot be known, as they were not given; but if any arguments were used, they were probably these: Warickshall's case, 1 Leach, 263, established the doctrine that "a confession forced from the mind by the *flattery of hope* or by the *torture of fear*, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." Now could hope flatter more seductively or fear torture more grimly than by using the language that was here employed? "It would be better for the prisoner at the trial if he confessed the *truth*, as the evidence against him was clear." An innocent man must have an unusually strong mind who, after such an appeal, could refrain from *falsely* acknowledging his guilt. It is true that the inducement must be held out by some person in authority; but here, though the

words were not indeed spoken by the constable himself, they were uttered in his presence and in his hearing; and as he did not immediately remove the erroneous impression which they were calculated so fatally to produce, the law wisely presumed they were *sanctioned* by his approval. The learned Judges relied (among many other cases) on *Rex v. Upchurch*, 1 Moo. 465; *Rex v. Kingston*, 4 C. & P. 387; *Rex v. Dunn*, id. 543; *Rex v. Shepherd*, 7 C. & P. 579; *Rex v. Enoch*, 5 C. & P. 540; and *Simpson's case*, 1 Moo. 410. The first confession was therefore clearly inadmissible: so was the second; for though a statement, said the Judges, made on *oath* before a magistrate, would probably be *true*, yet "if to the perplexities and embarrassments of the prisoner's situation were added the danger of perjury and the dread of additional penalties, the confession could scarcely be regarded as voluntary," and must therefore be rejected, as *nemo tenebatur prodere seipsum*. In support of this doctrine they cited *Smith's case*, 1 Stark. 242; *Davis's case*, 6 C. & P. 177; *Owen's case*, 9 C. & P. 238; and *Rivers' case*, 7 C. & P. 177. Here it appeared, on the face of the examination, that the prisoner had been sworn; and to allow proof that no oath was in fact administered, would be to contravene the established principle that parol evidence cannot be received to vary or contradict a written document. See *Wheeley's case*, 8 C. & P. 250, and *Pickesley's case*, 9 C. & P. 124. A pardon being recommended, the prisoner was forthwith discharged from custody.

The method by which we propose to remedy the glaring inconsistencies of these two cases, is to render all confessions receivable in evidence—*valeant quantum*. By adopting this plan, the legislature would avoid, what Mr. Phillips calls "the difficulties and uncertainty occasioned by frequent reference to a great variety of decisions, which require considerable research, abound with many subtle distinctions, and occasionally by their contrariety create much legal doubt." p. 44. That the innocent would incur any the slightest risk by this change, we do not believe; for the instances of a *false* admission of guilt must be very rare under any circumstances, and, even should they occur, we have sufficient confidence in the discretion of a jury to rely on their not being

misled: besides, to avoid the possibility of error, we would establish this further rule, which we borrow from the salutary law respecting accomplices, namely, that no prisoner should be convicted on his own confession, unless that confession were confirmed by independent evidence, not only as to the fact that the crime was committed, but as to the additional fact that the prisoner was a party to its commission.

We are the more anxious for the adoption of this last rule, as we are inclined to give but little weight to the great bulk of confessions; not indeed on the ground that prisoners intentionally tell falsehoods to their own prejudice, but because persons in humble life are frequently unable to express themselves with clearness, and words hastily spoken are easily misrepresented or misunderstood. Where a prisoner's confession is deliberately uttered, and immediately reduced to writing, it affords the most satisfactory proof of guilt, and bears out the assertion of the Roman orator—*optimum esse testem, confitentem reum*; but we agree with Mr. Justice Foster, that "hasty confessions made to persons having no authority are the weakest and most suspicious of all evidence. Proof," continues that eminent judge, "may be too easily procured; words are often misreported; whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction; and withal, this evidence is not in the ordinary course of things to be disproved by that sort of negative evidence, by which the proof of plain facts may be, and often is, confronted." p. 243. Still these reflections, while they point out the necessity of receiving such evidence with jealous caution, afford no reasonable grounds for its entire rejection. To say that it *may* mislead, is to say no more than must be admitted of all evidence; and such an objection, if allowed to prevail to the extent of exclusion, would not only render proof impossible in actions of slander and indictments for seditious words, but would, with one fell swoop, destroy the whole fabric of our civil and criminal jurisprudence.

The only remaining objection to the admissibility of all confessions is, that where a statement is made under the influence of a promise, which is not kept, a fraud is prac-

tised on the prisoner, and it is *hard* that the law should countenance such deception; but, without reminding the advocates for fairness, that this argument has been described by Bentham, in somewhat discourteous language, as "the old woman's reason," Evi. 5 vol. 230, it will be sufficient for our purpose to say that it amounts to no *legal* objection. For, not again to cite the cases of *Rex v. Shaw*, 6 C. & P. 372, and *Rex v. Derrington*, 2 C. & P. 418, we need only refer to the language of all the judges in *Warickshall's case*, 1 Lea. 263, wherein they state, "It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to *public faith*. No such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law."

The best mode of preventing improper attempts to *extort* confessions is, not to render confessions obtained by those means inadmissible, but to deprive the offending party of his costs; and with respect to the police force, to let it be generally known, that, in the event of a judge complaining of one of that body, he will not only lose his expenses, but be dismissed from the service. We are much mistaken if these means would not be found amply sufficient, to check an improper practice, and to protect the interests of the weakest prisoner.¹

Our next observations will apply to the mode of conducting business when points in criminal law are reserved for the consideration of the judges. These points, in the great majority of instances, are not publicly argued, but the judges meet in private to discuss them, and according as they decide, the judgment is affirmed or arrested. No reasons are given for the judgments pronounced. We conceive that this system is in every respect faulty: first, we cannot see the necessity of making the fifteen judges assemble to decide a question of criminal law, when the matured opinions of one third of that number would be amply sufficient for the due and consistent

¹ Those who wish to study the law of confessions will find the subject fully, ably and systematically discussed by Mr. Joy, in the treatise which we have placed at the head of this article. Mr. Greenleaf also, in his *American work on Evidence*, has bestowed twenty pages on the same subject, and has treated it with much clearness.

administration of justice, and when, in fact, the most important civil questions are every day decided by four judges to the entire satisfaction of the country; secondly, the private meetings of the judges are at least open to the charge, if not to the reality, of abuse. The consultations of physicians, where every subject is proverbially, though perhaps erroneously, supposed to be discussed except the one for which the grave doctors are assembled, naturally lead the caviller to suspect that, under similar circumstances, other learned men may possibly betray a like inattention; and suspicion, though unfounded, being thus once awakened, the decisions of the judges are apt to lose the confidence, and with the confidence the respect of the uninformed public. Nor are these evil consequences the less likely to occur because no reasons are given for the judgments pronounced. Lord Brougham, in his sketch of the character of Lord Thurlow, has very justly observed, that "this practice, if it saves the time of the public, gives but little satisfaction to the suitor. The judges who pursue it forget that, to satisfy the parties, or at least to give them such grounds as ought to satisfy reasonable men, is in importance only next to giving them a right judgment. Almost as important is it to satisfy the profession and the country, which awaits to gather the law, the rule of their conduct in advising or in acting, from the lips of the judge. * * * With an enlightened bar, and an intelligent people, the mere authority of the bench will cease to have any weight at all, if it be unaccompanied with argument and explanation."

It seems almost needless to remark, that this language, though pointed to judgments in civil proceedings, applies with at least equal force to those delivered in criminal cases, since questions respecting liberty and life are surely as important as those which relate to mere property. The fact is, that in adopting "this very bad practice of unreasoned decisions," "no security whatever can be afforded for the mind of the judge having been directed to the different parts of each case." His premises may have been hastily assumed, his conclusions may be unfounded, and certainly the best mode of testing the correctness of any opinion, namely, to ascertain whether it can be supported by sensible reasoning, is here omitted. But if an unreasoned decision be unsatisfactory as a judgment, it is in an

equal degree inoperative as a precedent. If cited in support of any principle, ingenious arguments will scarcely ever be wanting to the opposite side, to show that it does not of necessity establish the doctrine contended for; that, the reasons for the judgment not being explicitly given, the Court has a right to assume that the judges have been influenced by this or that consideration, and have not had their attention drawn to this or that fact—subtle distinctions are taken—conjectural differences are urged—and the consequence of all this is, that substantially the same points are reserved over and over again, and doubts exist which should never be allowed to arise.

Having ventured to notice the evils which attend the present system, we now suggest the following remedies. 1st. Let all criminal points reserved be publicly argued, either by the gentleman who conducted the defence at the trial, or, in case the prisoner employed no counsel, then by some member of the bar assigned, as in cases of high treason, for the express purpose, by the judge below. 2dly. Let five judges constitute a Court for hearing these arguments, and let them be selected either by rotation or in any other way that is more convenient, care being taken that one of the Chief Justices or the Chief Baron should preside at each Court. 3dly. Let the reasons for the judgments be publicly given.

The only objection which, we believe, can be urged against this plan is, that it would consume much time; but we do not think that this would be the result. Ten judges being relieved from their present unsatisfactory duties, thrice the time now occupied might clearly be employed by the remaining five in considering each case. If the points reserved became more numerous, a slight alteration in the present practice of the Central Criminal Court might with advantage be introduced. Let a single judge sit to try all offences in that Court, excepting only such as are of real national importance. We never could see why a prisoner should not be tried by one judge as well at the Old Bailey as at York or Chester Assizes. But even admitting, for argument, that some additional time would be consumed, still we contend that this is no valid objection. If the full Court of Queen's Bench can afford to listen to lengthened arguments, which have no other object than to prove or disprove that Mary Jones and her

bastard child have been properly removed from Carshalton to East Grinstead; or if the Court of Exchequer can find time for a discussion respecting the entitling of an affidavit, or the service of a writ of summons, they *must* have leisure to hear what can reasonably be urged in defence of a fellow subject, who complains that he is illegally sentenced to imprisonment, transportation, or death. So long as they deem it necessary to prepare elaborate and critical judgments upon the most trivial points of interlocutory civil practice, is it not monstrous to contend, that these arduous duties preclude the giving more than bare unreasoned decisions upon questions involving the life and liberty of every member of the state? This is indeed "to give tithe of mint and of anise and of cummin, but to omit the weightier matters of the law."

But we go further than this, and say that not only should the judges of assize and those who preside at the Central Criminal Court reserve difficult questions for the opinions of the judges, but the justices at quarter sessions should have similar powers granted them, and should be encouraged in the exercise of such powers. For even now, after an act has been passed to limit their jurisdiction, almost all crimes, excepting capital offences, and such as are originally punishable with transportation for life, may still be tried at the quarter sessions; and the number of prisoners who will in future be annually transported by the unpaid magistracy, may be fairly estimated at three or four thousand! Is it not therefore a strange anomaly to let a judge of the superior Courts reserve for the opinion of his learned brethren a point which *his* knowledge and experience cannot safely decide, and yet to compel a half-informed justice of the peace to form upon the same question a crude off-hand opinion, which, if right, can claim no higher praise than "*un accident heureux?*" It has been well observed, that the law thus leaves most to his discretion who has the least means of regulating his judgment.

But perhaps it will here be said, what we have ourselves with indignation heard asserted on more than one occasion, that no injustice follows this state of the law, since the prisoner, if dissatisfied, may move for a writ of error. But this assertion, while it deceives the ignorant and thoughtless, is a

mere insult to the injured. A writ of error ! why it would cost a hundred pounds. How is the wretched culprit to obtain as many pence ? Besides, this writ, if granted, can only give relief where the illegality is apparent on the face of the record, and is therefore utterly valueless in those numerous cases where either proper evidence is excluded, improper evidence admitted, or a false construction put upon the wording of an act. In all these cases the prisoner has no protection. He is a British subject, and without redress.

In our observations on the question of amendment, we briefly stated our disapprobation of the discretion vested in the judges of apportioning punishment. We now return to this subject, as being one not only interesting in itself, but, as we believe, little understood by the public. Indeed it is only through ignorance that the anomalous system of our law regarding punishments can be allowed to remain unamended. Thus, to some offences the precise penalty is affixed by statute, and the judges have no discretion of varying or mitigating the sentence in any respect. In other cases, a limited discretion is granted, and though the convict must be transported, the term of years may be increased or diminished as the Court shall adjudge. In others, again, a greater latitude is allowed, and the prisoner may either be transported, or imprisoned for a period not less than three years, or two years, or one year. And, lastly, the discretion, in a vast number of cases, and those too the most important, extends to any amount of punishment, from transportation for a limited period, or even for life, down to imprisonment for a single day or hour. We subjoin a table wherein offences are classified according to the discretion allowed in fixing the amount of their punishment. We do not pledge ourselves to its strict accuracy, but we believe it will be found sufficiently correct to afford a fair general view of the law of punishments. Those crimes only are included for which the highest penalty is transportation.¹

¹ We have been assisted in the formation of this table by an accurate and able book on the statute criminal law of England, written by Mr. Lonsdale, and published in 1839, by Mr. Maxwell. Those who want more information on this interesting subject are confidently referred to that work.

1st.—Crimes punished by transportation. No discretion.			
Punishment.	Felonies.	Misde- meanors.	Total.
Transportation for life	2	1	3
Banishment for life	—	3	3
Transportation for life, and previous to trans- portation, imprisonment for a term not ex- ceeding four years	1	—	1
Transportation for fourteen years	7	1	8
Transportation for seven years	15	1	16
Total	25	6	31
2nd.—Crimes punished by transportation. Discretion as to term.			
Transportation for life, or fourteen or seven years	2	—	2
Transportation for life, or term not less than seven years	1	—	1
Transportation for life or term such as Court adjudges.. .. .	1	—	1
Transportation for a term not exceeding four- teen years	1	—	1
Transportation for a term not exceeding seven years	5	—	5
Total	10	—	10
3rd.—Crimes punished by transportation, or imprisonment, for a term not less than three years, or two years, or one year.			
Transportation for life, or imprisonment for not less than two years	42	—	42
Transportation, not exceeding fourteen years, or imprisonment for not less than three years ..	10	—	10
Transportation, not exceeding fourteen years, or imprisonment for not less than one year ..	11	—	11
Transportation for seven years, or imprison- ment for not less than two years	1	—	1
Transportation for seven years, or imprison- ment for not less than one year.. .. .	3	—	3
Total	67	—	67
4th.—Crimes punished by transportation, or imprisonment, for any term.			
Transportation for life, or any imprisonment ..	55	—	55
Transportation, not exceeding fifteen years, or any imprisonment	13	—	13
Transportation, not exceeding fourteen years, or any imprisonment	8	6	14
Transportation for seven years, or any impri- sonment	50	20	70
Total	126	26	152
GRAND TOTAL	228	32	260

Now we contend that the above table discloses a most flagitious system; for either the discretion allowed to the judges in punishing the offences included in the fourth division is dangerous and improper, or the absence of all discretion in the cases comprised in the first division is cruel in the extreme. Both plans cannot be right; we believe that both are wrong. We would allow the judges in *all* cases *some* discretion, but this discretion should be confined within narrow limits. If a crime under any circumstances of aggravation deserves the grievous penalty of transportation for life, surely it can never be duly punished by a week's solitary confinement; at least there is but one offence known to the law which admits of such variety of guilt. We speak of manslaughter;—a crime which it would be well for the legislature to define with greater precision; since a man must serve a long apprenticeship to the law, before his powers of discrimination will become so obtuse, as to see no distinction in the *nature of the crime*, whether Bolam destroys his victim by savage violence, or Carr sells damaged cannon, 8 C. & P. 163, or the lad Sullivan, for a frolic, takes out the trap-stick from the front of a cart, 7 C. & P. 641. In the first case no discretion should be allowed the judge of imposing a nominal fine on the offender, and in the last two the prisoners should not run the risk of being transported for life, or even incur the degradation of being pronounced convicted felons, to say nothing of the penal consequences of forfeiture occasioned by such a verdict. But if it should be found, as we believe it would not, practically impossible to define the different species of manslaughter, and to fix a punishment correspondent with each species, then, though the present latitude of discretion would be excusable with respect to that particular crime, we contend that in no other instance could so enormous a discretion with propriety be allowed to continue. The judges and the magistrates are but men. Bodily infirmity may produce in the best disposition constitutional peevishness; or an injudicious counsel or a noisy public may ruffle for the moment the mildest temper. Then woe to the prisoner whose punishment depends on the arbitrary discretion of an irritated judge. Lord Camden has told us, in language we should never forget, that “The discretion of a judge is the law of tyrants; it is always unknown;

it is different in different men ; it is casual, and depends upon constitution, temper, and passion. In the best it is oftentimes caprice ; in the worst it is every vice, folly, and passion to which human nature is liable."

But independent of the danger of abuse to which this large discretion is subject, we doubt if it be not exposed to other serious objections. Not only does it increase to a painful degree the responsibility of the criminal judge, and make his office alike invidious to others and hateful to himself, but it fosters crime, by encouraging the criminal, and, whenever it dictates a sentence of severity, it causes the infliction of much *useless* suffering. The truth of this proposition may easily be proved. Hope is a far stronger passion than fear, especially among the bold, and they are the persons who for the most part transgress the laws. If then an offence is liable to a punishment which *may* be very severe, but *may also* be very trifling, the criminal, like the gambler, speculates on good luck, and boldly throws the die of crime. As a prudent calculator of chances he is justified in doing so, where, as generally occurs in cases of large discretion, nine light sentences are pronounced for one which is heavy. Surely the lot of decimation will not fall upon him ; but perchance it does fall, and with crushing force. It is idle to say that he deserves it ; man cannot read the heart of man ; and human punishment is not inflicted for retribution, but for prevention. Now this prevention is effected by fear of the consequences of conviction ; and if punishment fails in producing this fear, and it *will* do so if not moderately certain in degree, it fails absolutely ; and its infliction then occasions, what Archbishop Whately has forcibly called " mere *gratuitous* misery." So long as human passions remain the same, indefinite, uncertain, rare, and consequently unexpected, suffering, causes no terror ; and precisely the same feeling which makes the Neapolitan peasant live in fancied security among the valleys of Vesuvius, or the " wet sea boy " slumber " in cradle of the rude imperious surge," leads the successful and hardened delinquent forward in his lawless career.

The next alteration we propose is one the value of which will probably be recognised by all persons who are in the habit of attending the Central Criminal Court. We would

not allow that Court to sit *after dinner*. We shall say no more on this head further than remind our readers, that in the Annual Mutiny Acts the following salutary clause is always inserted, "No proceeding or trial shall be had upon any offence, but between the hours of eight of the clock in the morning and four in the afternoon." It would be a monstrous sarcasm against the officers of her Majesty's army to assume, that this enactment is advisable only where *they* are concerned!

We now approach a subject wherein our views would meet with but little opposition, if it were not for those influential and interested parties, qui, ut rationem nullam afferrent, ipsâ auctoritate nos frangerent—who make their will usurp the place of argument. We know that, in proposing that eight sessions at least shall annually be held in every county for the trial of offences, we shall of necessity give umbrage to the country gentlemen and barristers who attend the sessions. For instance, the magistrates of Kent will perhaps urge that they have no leisure; that they have never held adjourned sessions, and they do not know why they should now begin, that Maidstone gaol is sufficiently large to hold half the county, &c. &c.; and the bar who attend those quarter sessions will state that it would not be worth their while to go to the adjournments also: but to this we answer, that in Surrey there are no less than *twelve* sessions held every year, that the magistrates *there* have leisure, and the bar find it "worth their while" to attend. Why then should this discrepancy exist between adjoining counties, that whereas in Surrey a sheepstealer, or other serious offender, *must* be tried within a month of his committal, a poor fellow may be kept in gaol for nearly three months in Kent before he is acquitted of a charge of felony in stealing half a rotten hop-pole, value three halfpence? But granting that the proposed alteration would put the magistracy to some additional inconvenience, and the bar to some additional expense, still we contend that the benefit to the public will infinitely outweigh these considerations. In the first place the general expenses of the county will be greatly diminished; for, without entering here into any statistical discussion respecting the number of persons who each year are committed to take their trials, or the weekly cost of

each prisoner, it is clear that very large sums are uselessly expended, when numerous prisoners are incarcerated, and *must be fed*, for nearly three months before their trial commences. We have purposely placed in the van the question of finance; since we well know, what we blush to admit, that with the majority of mankind the argumentum ad loculum has far more influence than that ad misericordiam. Yet if there be any men who ever think of the miseries of the poor but when they reflect with self-complacency that they are not "as this Publican," or who ever speak of those miseries but when they seek for popular applause by rounding compassionate periods, we would ask, not in the language of excitement, but in sober calmness, whether it is not a grievous and crying injustice to imprison a poor man for ten or eleven weeks before he is so much as allowed to prove his innocence? For even assuming that "when a man is committed to prison for *trial*, every comfort and indulgence, consistent with his safe custody," is, as it "ought to be, allowed him;" and we are very far from admitting that such is the case; still the anxiety he must suffer for so long a period, the lingering degradation of feeling himself not merely a casual inmate but almost an *inhabitant* of a gaol, the lengthened pain of commingling with the lowest outcasts of society, a pain grievous in proportion as he deserves not to bear it; the absolute ruin brought on his wretched wife and family, who depend perhaps on his sole exertions for their daily subsistence; each and all of these incalculable evils plead for, nay demand, a change in the present system. For is it not the bitterest mockery, to tell such a prisoner that the merciful law of England presumes him to be innocent till he is proved to be guilty?

The instance we have just put, of a culprit being acquitted of a charge of *felony* in stealing a hop-pole, value three halfpence, suggests another alteration, which we believe would be productive of much benefit, and would be hailed with satisfaction by the country at large. We would allow the magistrates, at their weekly sessions, summarily to adjudicate in all cases which by the old law would have come within the definition of petty larceny. We would also modify the statute 7 & 8 Geo. IV. c. 29, ss. 38 to 43, inclusive, and make the agricultural offences therein enumerated cognizable by *two*

justices at the least in petty sessions assembled ; we would limit the punishment of the first offence to three, and of the second to six months ; and with these alterations we would extend the provisions of the act to all dead or live wood, fruit, or vegetables, whether fixed to the soil or placed thereon. For what can be more inconsistent than the present law ? If a determined rogue go by night to a gentleman's park paling, and break down and carry off enough oak timber to keep him in firing for a week, he may be taken the next morning before a single justice, fined and discharged ; nay, if he commit a second time the same outrage, he may still be punished by a single magistrate, and is no felon ; but if the gentleman is repairing his fence, and the carpenter leaves *unfixed* a fragment of crooked elm no larger than a man's hand, and of no more value than a schoolgirl's political opinions, then should an unfortunate peasant be seen to put the wood into his pocket, and meaning no harm, to take it to his good woman to help to cook a supper of potatoes for their little ones, the man is charged with felony ; and if pronounced guilty, his goods and chattels are forfeited to the crown. It is dangerous, says our law, to the liberties of the subject to allow one magistrate, aye, or two, to decide upon a crime of this magnitude. The culprit must be committed for ten or twelve weeks to the tender mercies of a gaoler ; at the end of this period some twenty *gentlemen*—the law presumes them *the equals* of the prisoner—institute a preliminary inquiry respecting his guilt or innocence ; and if the latter is not apparent as the noonday sun, a true bill is found against him : next he is brought before “ twelve good and lawful men of the county,” who are kept from their homes for the express purpose of trying him ; and these gentlemen, assisted and directed by a bench of magistrates, or perhaps by a judge of the superior courts, summoned from Westminster for the occasion, listen with pardonable impatience to the addresses of counsel, the statements of witnesses, and the learned observations of the judge ; and at last, through the goodnatured carpenter's swearing that he left the wood as useless refuse, pronounce a verdict of acquittal.

In like manner, though a justice of the peace may summarily punish the thief who steals a basket of pine-apples

from a hot-house, or a cartload of apples or potatoes or turnips *growing* in an orchard or a garden or a field, yet if these fruits or vegetables be once *severed* from the soil, the prisoner who unlawfully takes a single one, *must* be tried by a jury of his countrymen. The practical operation of this distinction is anomalous and oppressive; and the last calendar of prisoners for the Kent Assizes, which now lies before us, conclusively shows that the evil is at least one of frequent occurrence. We subtract a few cases, but first remind our readers that the Maidstone Assizes did not begin before the 14th of March.

Name and Trade of Prisoner.	When committed.	Offence.	Sentence.
Wm. Bayley, labourer	Jan. 7	Stealing one faggot, value 4d.	1 mon.h.l.
John Hook, do...	Jan. 10	Stealing four hop-poles, value 1s. 4d.	do.
Wm. Comber, do...	Jan. 13	Stealing two faggots, value 4d.	3 wks.do.
Wm. Philps	Jan. 15	Stealing several pieces of wood, value 2d.	1 mon.do.
Jeremiah Whiffen ..	Jan. 17	Stealing a bundle of withes, value 9d.	6 wks.do.
John Burgess	Jan. 17	Stealing two faggots, value 8d.	1 mon.do.
Charles Ellis	Jan. 17	Stealing one piece of beech wood	2 mon.do.
Henry Chatman	Jan. 26	Stealing two bushels of potatoes	acquitted.
William Ashby	Jan. 28	Stealing a bundle of hop-poles	do.
Charles Dodd	Jan. 31	Stealing one faggot	1 mon.h.l.

Here are ten persons, who have been subjected to imprisonment for a term varying from seven to ten weeks, merely *charged* with offences, which, even though *proved*, did not deserve one half of this punishment. The list contains sixteen more cases of agricultural pilfering, equally frivolous with those we have cited, besides many trifling town offences, which would come within the definition of petty larceny. Now we entertain the most sincere veneration for trial by jury, and we deem it an institution not only calculated to preserve the rights and independence of our countrymen, but one remarkably adapted to their tastes, their feelings, and their respected prejudices; still we think the love of those persons borders on a blind and childish adulation, who fancy that our national existence depends upon the law that every paltry pilferer of an apple or a turnip must be tried by a British jury. They may talk by the hour about the liberty of the subject; the liberty of the subject is in no danger by the change we propose; and even if it were, this liberty, like gold, may be bought too dear; and,

whatever its advocates may assert, we believe that the poor man will regard it with but little affection, when presented to his notice in the questionable form of a three months' imprisonment. But to protect his *fancied* interests, even at the expense of his *real* benefit, a clause might without difficulty be introduced into any act upon the subject, to the effect that the justices should have summary jurisdiction only in those cases where the prisoner himself *consents* to its exertion. This would put an effectual stop to all cavilling; and if any persons should be found still urging the exclusive perfection of the jury system in every case, we can only hope that such men may practically experience, *elsewhere*, the benefits of the system they admire; that they may be placed upon the jury panel, be assessed to the county rates, and become individually acquainted with prison discipline.

Lord Cardigan's trial, which we noticed above while urging the propriety of allowing amendments, deserves further consideration, as it relates to the present law of duelling—a law which we humbly conceive is far too severe.

If a party be killed in a deliberate duel the surviving principal, both seconds, the surgeon, and indeed all persons aiding and assisting either of the principals by their countenance and presence, are guilty of murder, and their legal punishment is consequently death.—Young's case, 8 C. & P. 644.

In every other case of duelling, whether either of the parties be wounded or not, all persons concerned are liable to be transported for life. See 7 W. IV. & 1 Vict. c. 85, ss. 2 and 3.

The bare statement of these stern laws is enough to show that they are utterly at variance with the opinions and feelings of the present age,—and even should a jury be found to convict, and a judge feel himself compelled to pronounce on the fair duellist the severest sentence which the law allows, there is not a minister of the crown who would dare to execute such a sentence. Then why hold out threats of punishment which it is well known will never be inflicted? It certainly does not tend to exalt the character of the laws, to have those in the statute book which cannot be enforced, neither does it increase the public abhorrence of felons, to have included among their number many of the brightest names in our history. When a Duke of York,—when a Wellington,—when Pitt, Fox, Sheri-

dan, Warren Hastings, Castlereagh, Tierney, Curran, Canning, and a hundred others, who either have been or are the leading men of the state, have committed with notorious impunity this offence, we could wish that it was no longer considered felony, and treated as such, when the Mirfins and Eliots are the parties concerned.

But even if this improper distinction between the wealthy and the humble were henceforth removed, and a firm government were determined at all costs and on all occasions to enforce the present penal laws respecting duelling, we doubt much if that crime would in consequence be diminished. The man, who *must* not confess that he fears the levelled pistol of his opponent at the distance of ten paces, could scarcely with decency avoid a challenge, on the ground that, should death ensue, his life would be forfeited to the justice of his country; since it is by showing his disregard for life, in comparison with honour, that he hopes to preserve or regain the esteem of his fellows; but the matter would be very different, if instead of being a felony, punishable with death or transportation, *fair* duelling were now in all cases to become a misdemeanour punishable by a few months' imprisonment *with hard labour*. The young men of ultra-fashion, who quarrel over champagne and hazard, though they might form a correct estimate of the value of their *lives*, would not choose to soil their boots and gloves with the dust of the tread-mill. The Sir Lucius O'Trigger would be deemed vulgar fellows, and the practice would soon become exploded in ridicule.¹

It is not, as far as respects duelling only, that we condemn the impolitic severity of the existing law; in cases of infant-murder we feel strongly that a more lenient punishment would be productive of much benefit. For now, since no legal distinction is recognized between this crime and ordinary murder, trials for child murder are proverbially futile. Juries commit perjury rather than convict, and judges strain the law almost till they break it in *favorem vitæ* of the wretched prisoner. The legislature in 1828, conscious that this had become practically the case, and feeling that the temptation

¹ We doubt whether any enactment of the kind would not rather retard than accelerate the progress of opinion, which alone can effect the desired object.—*Edit.*

to commit the crime was thus backed by a fair prospect of impunity, strove to correct the glaring evil; but neglecting the obvious course of annulling a law which society had pronounced with one voice to be too sanguinary, they passed an act rendering it a misdemeanour for any woman to endeavour to conceal the birth of her child, by secret burying or otherwise disposing of the dead body. This enactment was not the less unjust, that it was to some extent the adoption of a principle established by the act of 21 Jas. 1, c. 27, and subsequently recognized by the act of 43 G. 3, c. 58, namely, the making that a specific offence which was only inconclusive evidence of a higher crime. Now that this is an erroneous principle cannot be doubted by any one who will only suppose an act passed, whereby all persons avoiding policemen or constables should be subject to two years' imprisonment, on the ground that they had probably been guilty of larceny. The fact is, there is no possible guilt in the mere concealment of the birth of a bastard child; the having a bastard at all, or rather, to speak more correctly, the act which causes this result, is indeed a moral offence: still it is not a crime punishable by the laws of England; and if it were, the punishment should obviously attach on all persons guilty of fornication, and should extend to both parents; whereas the act, by confining the penalty to the mother who conceals her shame, not only screens the paramour, but indirectly sanctions and supports the unblushing avowal of profligate indulgence. The cruel injustice, therefore, of this act is now so apparent, that it has become in a great measure a dead letter; and indeed, if any thing were wanting to render it entirely such, the construction put upon it by the judges would seem to supply the deficiency. See *Reg. v. Turner*, 8 C. & P. 755; *Snell's case*, 2 Moo. & Rob. 44; *Ash's case*, id. 294; and *Bell's case*, id. 295.

The attempt of the legislature having thus signally failed, it remains to be seen if some other measure could not be suggested, which, by affixing a moderate punishment to this crime, might secure its due infliction, and so deter others from the commission of like offences. The plan which we propose with real diffidence is the following:—We would repeal the 64th section of the statute 9 Geo. 4, c. 31, and no longer permit the concealment of the birth to be punishable by law; but in

all cases where the mother destroys her offspring within a week from the time of delivery, she should be subject to punishment varying from seven years' transportation to two years' imprisonment. We are well aware that in naming this lenient sentence we run the risk of outraging the feelings of some persons whose opinions demand respect. "Whoso sheddeth man's blood, by man shall his blood be shed," is an ordinance from Heaven which, we believe, has too often been quoted by persons who do not reflect that, if taken in its literal meaning, it will apply indiscriminately to all cases of homicide. Admitting its entire justice as applied to murder, we contend that men may err in the definition of this crime, and that they have in fact done so, in including the offence of which we are now treating within that definition. For a mother to kill her own child at the time of delivery is a grievous crime, but it is not murder. Mr. Justice Foster, in his admirable discourses on homicide, observes that "the benignity of the law regardeth human infirmity, which though in the eye of the law criminal, yet is considered as incident to the frailty of the human frame," and he adds, that "the cases falling under the head of manslaughter, which most frequently occur, are those where death ensueth upon a sudden affray and in heat of blood, upon some provocation given or conceived." Now if the passion of indignation be sufficient to reduce the crime of homicide from murder to manslaughter, are there not other passions and other feelings as difficult to control, as powerful in their effects, and "as incident to the frailty of the human frame," as anger under any circumstances can be? and if this be so, are not such passions and feelings entitled to some consideration from the "benignity of the law?" The burning sense of shame is one of these feelings, and when acting on a frame shattered by the most frightful sufferings, and on a mind impelled by anxiety and terror to the very verge of insanity, is it fair that the law, which interposeth in favour of man's sudden resentment, should turn an inexorable ear to the cry of mercy from a woman, who in such a moment has been driven to a deed of desperation? If this distinction is allowed to prevail, it can only be because man is the legislator, and woman the victim.

Here let us pause. We do not pretend to have exhausted the subject of penal amelioration; we are well aware that

much might be urged in support of the system of appointing crown prosecutors, and many useful hints might be thrown out to restrain the shameless extortion which the vile harpies, who prey upon the inmates of a gaol, now practise to so grievous an extent; we know that the law respecting madness, and that which relates to the costs of traverses, require a judicious amendment,—but we have already trespassed too long on the patience of our readers.

J. P. T.

ART. II.—THE ANCIENT WELSH LAWS.

1. *Ancient Laws and Institutes of Wales, comprising Laws supposed to be enacted by Howel the Good, modified by subsequent Regulations under the native Princes prior to the Conquest by Edward the First: and anomalous Laws, consisting principally of Institutions which by the Statute of Ruddlan were admitted to continue in force: with an English Translation of the Welsh Text, to which are added a few Latin Transcripts, containing Digests of the Welsh Laws, principally of the Dimetian Code. With Indexes and Glossary. Printed by command of his late Majesty King William IV., under the direction of the Commissioners of the Public Records of the Kingdom. Folio. London: Butterworth. 1841.*
2. *The Misfortunes of Elphin. By the Author of Headlong Hall. Sm. 8vo. London. 1829.*

IF when about to review the statutes passed in the last year of Queen Victoria, we were to head our article with Tennyson's Poems or "Zanoni," it would justly be thought that our notions of the relations of things were, to say the least, marvellously comprehensive. Perhaps no two subjects stand wider apart than the law and poetry of our times. Such is a result of an advanced state of civilization. But it was not so twelve hundred years ago among our barbarian ancestors, whose laws and whose poetry, for the most part, have the same elemental characteristics. Feasting, fighting and singing

are the three great features of early British life, and each with its contingent relations form the principal subjects to which the attention of the legislator and the bard is chiefly directed. The chorus of the heroes of Dinas Vawr is the tale common to the period.

“The mountain sheep are sweeter,
But the valley sheep are fatter;
We therefore deemed it meeter
To carry off the latter.
We made an expedition:
We met a host and quelled it;
We forced a strong position,
And killed the men who held it.
* * * * *

“We brought away from battle,
And much their land bemoaned them,
Two thousand head of cattle,
And the head of him who owned them:
Ednyfed, king of Dyfed,
His head was borne before us;
His wine and beasts supplied our feasts,
And his overthrow, our chorus.”

This fact may be illustrated by every page of the large folio volume of the “Welsh Laws” which has recently been published at the national cost. These mutual relations between the laws and the poetry of the Welsh should not be overlooked, and are by no means either unamusing or uninteresting. They afford a very correct index to the state of the people and the times when these laws obtained, and give us an opportunity of enlivening the pages of the Law Magazine, without stepping beyond its legitimate scope. We have therefore coupled with the solemn volume a novel published some years ago for the purpose of exhibiting specimens of the ancient Welsh songs, and we purpose treating them together as the basis of the present article.

If we divest the translations of the sparkling wit of the author, we might almost interchange passages between the “Songs” and the “Laws,” so that it would be puzzling to assign each to its proper place. For every line of the national poetry a corresponding image or sentiment might be found in

the national laws. "The worth of a vat of mead," says the Dimetian Code, "supplied to the king, is six-score pence; and it ought to be sufficiently capacious for the king and his elder to bathe therein."—p. 260. Under such a law it was natural enough that the people should toast as a national sentiment—

"Not drunk is he, who from the floor
Can rise alone and still drink more;
But drunk is he, who prostrate lies,
Without the power to drink or rise."¹

One of the privileges which Run granted to the men of Arvon was, "that they drink not stinted measure;" and among the Triads of the Isle of Britain it is recorded there were "three immortal drunkards, Ceraint of Essyllwg, Gwrtheyrn Gwrthenau, and Seithenyn ap Seithyn Saidi." The allowance of liquor which each officer of the court was to receive was fixed by the code. The chief of the household was to have "three hornsful of liquor, the best in the palace; one from the king, the second from the queen, the third from the steward." The priest had "one hornful." The chief falconer was enjoined "only to quench his thirst while in the palace, lest his birds should be injured by neglect."

"The origin of bees," provides the Gwentian Code, p. 360, "is from paradise, and on account of the sin of man they came from thence, and God conferred his blessing upon them; and therefore the mass cannot be sung without wax."

Thus said the Laws, and the bard chanted the virtues of the bee in spirit of true allegiance to it.

"As the cup of the flower to the bee when he sips
Is the full cup of mead to the true Briton's lips:
From the flower-cups of summer, on field and on tree,
Our meed-cups are filled by the vintager bee."

¹ The numerous Welsh students at Gray's Inn will perhaps like to have the original authority for this:

"Nid meddw y dyn a allo
Cwnu ei hun a rhodio
Ac yved rhagor ddiawd
Nid yw hyny yn veddwawd."

In all the codes, Venedotian, Dimetian, and Gwentian, horns and harps are subjects of great consideration. Thus the Venedotian Code enacts—

The king has three horns of assemblage, which are to be of buffalo horn and of equal worth: the horn the king drinks out of, his horn of assembling, and the horn of the chief huntsman; the worth of each of them is one pound.

There are three bugle-horns of the king, the value of each of which is one pound: the horn of carousal, the horn of mustering, and the hunting-horn in the hand of the chief huntsman.—*Gwentian Code*, p. 381.

There are three legal harps: the king's harp, the harp of a chief of song, and the harp of a gwrda.

And the bards sung—

" Fill the blue horn, the blue buffalo horn ;

Natural is mead in the buffalo horn :

As the cuckoo in spring, as the lark in the morn,

So natural is mead in the buffalo horn.

" The horn, the blue horn, cannot stand on its tip ;

Its path is right on from the hand to the lip :

Though the bowl and the wine-cup our tables adorn,

More natural the draught from the buffalo horn.

" Fill high the blue horn, the blue buffalo horn—

Fill high the long silver-rimmed buffalo horn.

While the roof of the hall by our chorus is torn,

Fill, fill to the brim, the deep silver-rimmed horn."

Before the tenth century, Dr. Aneurin Owen, the learned Welsh editor of the Laws, states that " the mist of obscurity envelopes all accounts of the ancient institutions of the Isle of Britain." But about that period one Howel Dda, or Howel the Good, who was a king in South Wales, compiled certain laws, which exist in several versions, not materially differing from each other, under the respective names of the Venedotian, the Dimetian and Gwentian Codes. The original prefaces to these Codes state the manner and the grounds upon which they were compiled, and, placing them in juxtaposition, the reader may see the varied accounts of their origin.

Venedotian Code.

Howel the Good, the son of Cadell, prince of all Cymru, seeing the Cymry perverting the laws, summoned to him six men from each cymwd in the principality, the wisest in his dominion, to the White House on the Tav; four of them laics and two clerks. The clerks were summoned lest the laics should ordain any thing contrary to the Holy Scriptures. The time when they assembled together was Lent, and the reason they assembled in Lent was, because every one should be pure at that holy time, and should do no wrong at a time of purity. And with mutual counsel and deliberation the wise men there assembled examined the ancient laws; some of which they suffered to continue unaltered, some they amended, others they entirely abrogated, and some new laws they enacted.

Venedotia, or Gwynedd, contained the greater part of what is now called North Wales.

Dimetian Code.

Howel the Good, son of Cadell, by the grace of God king of all Cymru, observed the Cymry perverting the laws and customs, and therefore he summoned to him from every cymwd of his kingdom, six men who were practised in authority and jurisprudence, and all the clergy of the kingdom possessed of the dignity of the crosier, as the Archbishop of Menevia, and bishops, the abbots and priors, to the place called the White House upon the Tav, in Dyved. That house he ordered to be constructed of white rods, as a lodge for him in hunting, when he came to Dyved; and on that account it was called the White House. And the king, with that assembly, remained there during the whole of Lent, to pray to God, through perfect abstinence, and to implore grace and discernment for the king to amend the laws and customs of Cymru. And at the termination of Lent, the king selected out of that assembly twelve of the wisest laics and the most learned scholar, who was called the Master Blegywrd, to form and systemize the laws and usages for him and his kingdom perfectly, and the nearest possible to truth and to justice.

Dyved, or West Wales, in strict acceptation, was the name of the district bounded by the Tywi on the S. E., and by the Teivi on the N. W., but, in a wider sense, the country over which the ecclesiastical supremacy of the see of Menevia extended.

Gwentian Code.

Howel the Good, son of Cadell, king of Cymru, enacted by the grace of God and fasting and prayer, when Cymru was in his possession in its bounds; to wit, three-score and four cantrevs in South Wales, eighteen cantrevs in Gwynedd, three-score trevs beyond Cyrcbell, and three-score trevs in Buallt. And within that limit the word of no one went before their word, and their word was binding upon all.

As bad customs and bad laws existed before his time, he summoned six men from every cymwd in Cymru, and assembled them at the White House upon the Tav, together with seven-score croziers, between bishops and archbishops, and abbots and good teachers, to form wholesome laws and to abrogate the bad ones before his time, and to give them stability in his own name; and out of that number, twelve of the wisest laics and the best scholar was selected to make those laws. And when they had finished those laws, they imprecated the malediction of God and of the assembly, and of Cymru in general, upon whomsoever should break those laws.

And this book was compiled according to Morgeneu and Cynnerth, his son. And these men were the best in their time for record and laws and periods.

Gwent is the appellation of the district in Wales inhabited by the Silwres, in the diocese of Llandaff.

The congress at the "Whitehouse,"—near the site of Whitland Abbey, in Caermarthenshire,—was held, according to various authorities, in A. D. 914, 926, 940, 942, 943. Dr. Owen fixes the period at 943.

The chronology of these codes is very uncertain : they were probably the work of successive periods. Thus the Venedotian Code, said to be the compilation of Jorwerth, son of Madog, son of Raawd, notices changes in the laws of Howel Dda, made by Bleddyn, a prince of North Wales, about 1080. Alterations made by Rys, son of Grufudd, prince of West Wales, about 1180, are noticed in the Dimetian Code.

The body of this work consists of these three codes. "The sources from which the materials for this edition have been drawn," says the editor, "comprise the manuscripts employed by Dr. Wotton, together with those used by him ; the Wynnstay collection contributed a valuable manuscript, the splendid Hengwrt collection furnished a large store of materials, and other various unexplored sources afforded much, the particulars of which are enumerated in the following pages."

Coleridge was in the habit of saying that the best critic of a work was the author of it, as he of necessity knew most about it. This is especially true of a work like the present. We doubt much whether there are a triad of learned men in all Britain who are qualified to pass judgment on these labours of Dr. Owen. Even the knowledge of the Welsh language itself is verging towards extinction, helped, in some degree perhaps, by the rejection of Mr. Jervis's motion in the House of Commons, that Welsh bishops should be qualified to preach in Welsh. For our own parts, we may candidly admit that our knowledge of the Welsh and their language extends little beyond what a tour among the mountains of the country, made years before there was a carriage road through the pass of Llanberris, conferred. We certainly did hear some Welsh words spoken occasionally, we did see a solitary goat—he was undergoing washing and combing at Tan-y-bwlch—and we did hear a bard—if a harper who played without singing is such—at Capel Cerrig. A modern tourist can rarely boast of such good fortune. We may, however, venture to say that there is every appearance of great research and labour having

been bestowed on this volume, and that the editor seems to have exerted extraordinary diligence in consulting every manuscript he could find.

The Venedotian Code is divided into three books. Book I. treats of the "Laws of the Court;" Book II. of the "Laws of the Country;" Book III. is the "Proof Book." How much more important was the business of the king than that of the people, may be seen in the relative number of enactments touching both. There are forty-three chapters in the "Laws of the Court," thirty-one in the "Laws of the Country," and twenty-five in the "Proof Book." The picture which the novelist gives of King Gwythno is borne out by the character of the laws to which he was peculiarly subject. "Like other kings, he found the business of governing too light a matter to fill up the vacancy of either his time or his head, and took to the more solid pursuits of harping and singing; not forgetting feasting, in which he was glorious, nor hunting, wherein he was mighty. His several pursuits composed a very harmonious triad. The chace conduced to the good cheer of the feast, and to the good appetite which consumed it; the feast inspired the song, and the song gladdened the feast and celebrated the chace. Gwythno and his subjects went on together very happily; they had little to do with him but to pay him revenue, and he had little to do with them but to receive it. Now and then they were called on to fight for the protection of his sacred person, and for the privilege of paying revenue to him rather than to any of the kings in his vicinity, a privilege of which they were particularly tenacious." The first chapter of the Laws of the Court fixes the officers of the court, who are as follows: chief of the household, priest of the household, steward, chief falconer, judge of the court, chief groom, page of the chamber, bard of the household, silentiary, chief huntsman, mead-brewer, mediciner, butler, doorward, cook, candlebearer. Then the following officers to the queen: a steward, priest, chief groom, page of the chamber, handmaid, doorward, cook, candlebearer. Chapter the second regulates the "saraad," or fines due to the king. Thus the King of Aberfraw, a village on the west coast of Anglesey, was to receive an hundred cows for each cantrev, (literally a hundred townships,) and a white bull, with red

ears, to every hundred cows; and a rod of gold, equal in length to himself and as thick as his little finger; and a plate of gold as broad as his face and as thick as the nail of a ploughman, *who had been ploughman for seven years*. This measure of thickness, as well as that of the mead-vat, before mentioned, for capacity, shows that the people were destitute of any recognized standards of measurement.

The fines payable to the queen exhibit a barbarous looseness of manners in the early Welsh courts. Laws being made to provide rules for general conduct, and not for exceptions, it would seem that it must have been no uncommon thing to "strike the queen with the fist," or "to snatch anything out of her hand," since the specific "saraad" for those acts is named.

The duties, perquisites, and privileges of each officer occupy several chapters, and are detailed with singular minuteness. We can find room for a very few specimens only. The chief of the household is to have a song from the bard whenever he may desire it. The priest of the household was to sit opposite to the king, on the opposite side of the fire next the screen, to say grace and to chaunt the pater; he had the "dress worn by the king during Lent." The falconer is to be honoured with three presents the day his hawk shall kill one of the three birds; a bittern, a heron, or a crane. The judge was to sit next to the priest, to have a pillow and bed-linen from the queen, a throw-board¹ (of the bone of a sea animal) from the king, and a gold ring from the queen, and another from the bard of the household, and these trinkets he was neither to sell nor give away whilst he lived; he was always to go through the great gate, and never through the wicket. The chief groom was entitled to four-pence for every horse which the king may give, except from the bishop (because the king holds his sleeves whilst the bishop washes himself), the chief falconer, and the jester (because he is to tie the halter which is on the horse's head given to him around his testicles as he goes from the palace). The candle-bearer was to have the wax he may bite off the tops of the candles in the palace. The porter took a handful of every gift

¹ Dr. Owen explains that the game of throw-board was played with a black king and eight black men, against sixteen white men.

that went through the gate—of fruit, eggs, herrings, &c.; of the swine taken in pillage that pass through the gate—the sow which he shall be able, with one hand, to lift by her bristles until her feet are as high as his knees—the animal coming through the gate without a tail: he was to perform errands throughout the palace gratuitously, and he is to have the remains of the cheese he may toast.

The king, the queen, and all the chief officers of the court were entitled to grant certain “protections” to offenders. Some of these “protections” are regulated by time; some by distance dependant, it would seem, on the nature of the office.

The *Steward* afforded protection “to a place of security.”

The *Falconer*—Unto the queen—others say, that it is unto the farthest place where he shall fly his hawk at a bird.

The *Judge*—Unto the queen.

The *Chief Groom*—During a course of the swiftest horse at the court of the king.

The *Page of the Chamber*—From the time one goes to get a burden of straw to put under the king, and upon his return make his bed and spread the clothes thereon at night, until he shall take them off on the morrow, to convey away an offender without pursuit, without opposition.

The *Bard*—From the first song to the last.

The *Silentiary*—From his first proclamation of silence unto the last, to convey away an offender.

The *Huntsman*—To convey an offender so far that the sound of his horn can scarcely be heard.

The *Mead-brewer*—From the time he shall begin to make a vat of mead until he shall tie the covering over it, to convey away an offender.

The *Cook*—From the time he shall begin to prepare the first dish until he shall place the last before the king, to convey an offender away.

The *Candlebearer*—To convey away an offender from the time the first candle is lighted until the last extinguished, without pursuit or impediment.

The *Handmaid*—From the time she shall spread the clothes on the queen’s bed until she shall take them off the following day.

The *Woodman*—As far as he can throw his axe or his bill.

The *Bakingwoman*—As far as she can throw her peel.

The *Chief of Song*—From the time he shall begin the first song in the palace until he shall finish his last song.

The *Laundress*—As far as she can throw her washing-beetle.

The last Chapter of the Laws of the Court “treats of other things.” Among them the following may be quoted:—

The three indispensables to a king are: his priest, to say grace and sing mass; the judge of the court, to elucidate every thing doubtful; and his household for his commands.

Three things which the king is not to share with any person; his treasure, his hawk, and his thief.—*Venedotian Code*.

Three arts which the son of a taeog is not to learn without the permission of his lord, and if he should learn them, he must not exercise them, except a scholar after he has taken holy orders: these are, scholarship, smithcraft and bardism.

Three things which the king is not to share with another, if obtained by spoil in another country: gold and silver treasure, buffalo horns, and dress which has a gold border to it.—*Venedotian Code*.

The same occur with little variations in the Dimetian Code, 213.

When a song is desired, the chaired bard is to begin the first song of God, and the second of the king who shall own the palace, or if there be none, let him sing of another king. After the chaired bard, the bard of the household is to sing three songs, on various subjects.

If the queen desire a song let the bard of the household go to sing to her without limitation in a low voice, so that the hall may not be disturbed by him.—*Venedotian*, 16.

The first chapter of the “Laws of the Country” begins with the “Laws of the Women.” They provide for the division of the children between man and wife, “two shares to the father, one to the mother.” The division of the household furniture is very curious and minute and worth quotation, though rather long.

The household furniture is to be thus shared: all the milking vessels, except one, go to the wife; all the dishes, except one dish, to the wife, and those two go to the husband; the wife is to have the car and the yoke to convey her

furniture from the house. The husband is to have all the drinking vessels; the husband is to have the riddle; the wife is to have the small sieve. The husband is to have the upper stone of the quern, and the wife the lower. The clothes that are over them belong to the wife; the clothes that are under them belong to the husband until he marries again, and after he marries, the clothes are to be given to the wife; and if another wife sleep upon the clothes, let her pay wyneb-werth to the other. To the husband belong the kettle, the bed coverlet, the bolster of the dormitory, the coulter, the fuel axe, the auger, the settle, and all the hooks except one, and that to the wife. To the wife belong the pan, the trivet, the broad axe, the hedge bill, the ploughshare, all the flax, the linseed, the wool, the house-bag with its contents, except gold and silver, which if there be any are to be shared: the house-bag is the hand-bag. If there be webs they are to be shared; the yarn balls to the children if there be any, if not, they are to be shared. The husband is to have the barn and all the corn above-ground and under-ground; the husband is to have all the poultry and one of the cats, the rest belong to the wife.—*Venedotian Code.*

The provisions are to be thus shared: to the wife belong the meat in the brine, and the cheese in the brine; and after they are hung up they belong to the husband; to the wife belong the vessels of butter in cut; the meat in cut, and the cheese in cut: to the wife belongs as much of meal as she can carry, between her arms and knees, from the store-room into the house.—*Venedotian Code.*

Sexual offences are regulated with great precision. Here is a specimen or two:

If a maid be given to a man, and she be found by the man to be deflowered, and he allow her to remain in his bed until the following morning; he cannot on the morrow take away any of her due: "sed si, postquam illam vitiatamprehenderit, surrexerit ad pronubos et testaretur eis se illam vitiatam invenisse, et non concubuerit cum illa ad crastinum usque; nihil ab eo in crastinum habebit. Si mammæ et crines et menses apparuerint tunc lex pronuntiat neminem posse certo scire num virgo sit necne, propter hæc signa;" and therefore the

law allows her to be exculpated by the oaths of seven persons, including her mother, her father, her brothers, and her sisters. If she will not be exculpated, let her shift be cut off as high as her hip; and let a yearling steer be put in her hand, having his tail greased with tallow; and if she can hold him by his tail, let her take him in lieu of her share of the argyvreu, and if she cannot hold him let her be without any thing.—*Venedotian.*

If a woman say that a man has committed a rape upon her, and the man deny it, let him give the oaths of fifty men, without an alltud, without a “gwr nod.”

If she legally urge her plaint, “prehendat — ejus manu sinistra et dextra reliquiis imposita juret super istas, eam ipsam stupravisse isto — per vim,” causing shame and saraad to herself, to her kindred, and to her lord. Some of the judges will not admit a denial against this; we however admit a denial, as we have previously said.—*Venedotian.*

The three peculiars of a woman: her cwyll, her gowyn, and her saraad; the reason these three are called three peculiars is because they are the three proprieties of a woman, and cannot be taken from her for any cause: the cwyll is what she receives for her maidenhood; her saraad is for every beating given to her by her husband, except for three things: and those three, for which she may be beaten, are for giving any thing which she ought not to give; for being detected with another man in a covert; and for wishing drivel upon his beard; and if for being found with another man he chastise her, he is not to have any satisfaction besides that; for there ought not to be both satisfaction and vengeance for the same crime; her gowyn is, if she detect her husband with another woman, let him pay her six-score pence for the first offence, for the second, one pound; if she detect him a third time she can separate from him, without losing any thing that belongs to her; and the property she may obtain for the above three things, is to be apart from her husband; and if she endure without separation after the third offence, she is not entitled to any satisfaction.—*Venedotian.*

We might prolong our quotations, each one more or less amusing and illustrative of the state of the early British; but when we have given some sketches of their history from the

“Misfortunes of Elphin,” we shall conclude with a few specimens taken from the volume generally.

“The science of political economy was sleeping in the womb of time. The advantage of growing rich by getting into debt and paying interest was altogether unknown: the safe and economical currency, which is produced by a man writing his name on a bit of paper, for which other men give him their property, and which he is always ready to exchange for another bit of paper of an equally safe and economical manufacture, being also equally ready to render his own person at a moment’s notice, as impalpable as the metal which he promises to pay, is a stretch of wisdom to which the people of those days had nothing to compare. They had no steam engines, with fires as eternal as those of the nether world, wherein the squalid many, from infancy to age, might be turned into component portions of machinery for the benefit of the purple-faced few. They could neither poison the air with gas, nor the waters with its dregs: in short, they made their money of metal, and breathed pure air and drank pure water, like unscientific barbarians.

Of moral science they had little: but morals without science they had about the same as we have. They had a number of fine precepts, partly from their religion, partly from their bards, which they remembered in their liquor and forgot in their business.”

Such for example as the following :

There are thirteen things corrupting the world, and which will ever remain in it; and it can never be delivered of them; which are—

1. An unjust king.
2. A weak lord.
3. A transgressing judge.
4. A married priest.
5. A co-operator without a plan.
6. A people without instruction.
7. A country without law.
8. A bishop without knowledge.
9. An old person without religion.
10. A youth without humility.
11. A wealthy miser.

12. A necessitous proud man.

13. A contentious thief in a country.—*Laws*, 564.

Law is a channel of equity between a plaintiff and a defendant, and a lord.

There are three channels in law : one is a channel to preserve honesty ; the second is, a channel to strengthen equity ; the third is, a channel to clear truth : those three are, a lord, a surety, and a worthy judge between parties.—*Laws*, 584.

Seven legal qualities which a judge ought to possess. To be—

Mute and deaf,
Bold and eloquent,
Humble and fearful,
And religious.

And those are the characteristics recommended to the student of the law.—*Dimet*. p. 301.

There are three universalities of a country : armament, pleas, and church, for every body is under summons to them.

Three scowls for which no reparation is to be made : the scowl of a husband at a wife, given to him as a maid, and being a woman ; the second is, when a person is ruined by law, and his kindred scowl at him who ruined him ; the third is, the scowl of a man at a dog attacking him.

The three disgraceful faults of a man : the being a faithless friend ; feeble in pleadings ; and a man to a bad lord.

The three signs of inhabitancy of a country : little children, and dogs, and cocks.—*Gwentian*, p. 381, 382.

Whoever would prosper, let him avoid loving three things over much : woman, ebriety, and sleep.—*Laws*, 437.

There are three errors in law : an undefined claim, an incomplete denial, and an incongruous record.—*Laws*, 583.

“ Political science (continuing our quotation from the novel) they had none. The blessings of virtual representation were not even dreamed of ; so that when any of their barbarous metallic currency got into their pockets or coffers, it had a chance to remain there, subjecting them to the inconvenience of unemployed capital. Still they went to work politically much as we do. The powerful took all they could get from their subjects and neighbours, and called something or other sacred and glorious when they wanted the people to fight for them. . . .

"There was no liberty of the press, because there was no press ; but there was liberty of speech to the bards, whose persons were inviolable, and the general motto of their order was "Y Gwir yn erbin y Byd," the Truth against the World.

In physical science they supplied the place of knowledge by converting conjectures into dogmas ; an art which is not yet lost. They held that the earth was the centre of the universe ; that an immense ocean surrounded the earth ; that the sky was a vast frame resting on the ocean ; that the circle of their contact was a mystery of infinite mist, with a great deal more of cosmogony and astronomy equally correct and profound

Medicine was cultivated by the Druids, and it was just as much a science with them as with us ; but they had not the wit or the means to make it a flourishing trade, the principal means to that end being women with nothing to do, articles which especially belong to a high state of civilization

The religion of the time was Christianity grafted on Druidism. The Christian faith had been very early preached in Britain. Some of the Welsh historians are of opinion that it was first preached by some of the apostles, most probably by St. John. They think the evidence inconclusive with respect to St. Paul. But at any rate, the faith had made considerable progress among the Britons at the period of the arrival of Hengist, for many goodly churches, and, what was still better, richly endowed abbeys, were flourishing in many places. The British clergy were however very contumacious towards the see of Rome, and would only acknowledge the spiritual authority of the archbishopric of *Caer Leon*, which was during many centuries the primacy of Britain. St. Augustin when he came over, at a period not long subsequent to that of the present authentic history, to preach Christianity to the Saxons, who had for the most part held fast to their Odinism, had also the secondary purpose of making them instruments for teaching the British clergy submission to Rome : as a means to which end, the newly converted Saxons set upon the monastery of *Bangor Iscoed* and put its twelve hundred monks to the sword. This was the first overt act in which the Saxons set forth their new sense of a religion of peace. It is alleged, indeed, that these twelve hundred monks supported themselves

by the labour of their own hands. If they did so, it was no doubt a gross heresy; but whether it deserved the castigation it received from St. Augustin's proselytes, may be a question in polemics. . . .

When any of the Romans or Saxons who invaded the island fell into the hands of the Britons, before the introduction of Christianity, they were handed over to the Druids, who sacrificed them with pious ceremonies to their goddess Andraste. These human sacrifices have done much injury to the druidical character amongst us, who never practise them in the same way. They lacked, it must be confessed, some of our light and also some of our prisons. They lacked some of our light, to enable them to perceive that the act of coming in great multitudes with fire and sword to the remote dwellings of peaceable men, with the premeditated design of cutting their throats, ravishing their wives and daughters, killing their children, and appropriating their worldly goods, belongs not to the department of murder and robbery, but to that of legitimate war, of which all the practitioners are gentlemen and entitled to be treated like gentlemen. They lacked some of our prisons in which our philanthropy has provided accommodation for so large a portion of our own people, wherein, if they had left their prisoners alive, they could have kept them from returning to their countrymen and being at their old tricks again immediately. They would also, perhaps, have found some difficulty in feeding them, from the lack of the county rates. . . .

The people lived in darkness and vassalage. They were lost in the grossness of beef and ale. They had no pamphleteering societies to demonstrate that reading and writing are better than meat and drink, and they were utterly destitute of the blessings of those 'schools for all,' the house of correction and the treadmill."

The dictum of Judge Buller, that a man was entitled to beat his wife with a stick as thick as his thumb, appears to have been based on an early Welsh law:

If a wife speak an ireful word to her husband, such as wishing driven upon his beard, or dirt in his teeth, or call him a cur, she is to pay him three kine camlwrw, for he is lord over her; or if she like it better, to be struck three strokes with a rod of the length of the forearm of her husband and

of the thickness of his long finger, and that wheresoever he may will excepting her head.—*Laws*, 436.

Cats seem to have been an object of legal solicitude. If a man parted from his wife, he was to take away only one, and leave the rest.

Whoever shall sell a cat, is to answer for her not going a caterwauling every moon, and that she devour not her kitten, and that she have ears, eyes, teeth, and nails, and being a good mouser.—*Dimetian Code*, 283.

The exportation of corn was prohibited.

Three things that are not to be conveyed to a foreign country, without the permission of the country and the lord : gold, books, and wheat.—*Laws*, 655.

In one of the Codes is a version of the logic by which the worth of a man is fixed, which our readers may recollect in the old English ballad of King John and the Abbot of Canterbury, and also in Bürger's Poems. The king says —

“ Tell me to one penny what I am worth.”

The clown answers—

“ For thirty pence our Saviour was sold
Amonge the false Jewes, as I have bin told,
And twenty-nine is the worth of thee,
For I thinke thou art one penny worser than hee.”

In the *Dimetian Code* :

Twenty-four pence is the worth of the blood of every kind of persons ; thirty pence was the worth of the blood of Christ, and it is unworthy to see the blood of God and the blood of man appraised of equal worth ; and therefore the blood of a man is of less worth.—*Dimetian*, 247.

Among the Anomalous Laws, however, the following question is asked and answered :

Is there any blood of greater worth than twenty-four pence ?
There is : the blood of a foetus.—*Laws*, 407.

The following may be received as a sample of the “ Triads.”

The three mighties of the world : a lord, a brave, and a non-entity ; the reason is, a lord is like a stone along the ice, and a brave is an idiot, and an idiot is not to be ruled in anything against his will ; and a person who is a non-entity is one without any property, and therefore property cannot be exacted where there is none.—*Laws*, 406.

Three futile expressions which, uttered in court, do not avail: denial before a verdict; premature objection; remembrance and pleading after judgment.—*Dimetian Code*, 215.

There are three worthless milks: the milk of a cat; the milk of a bitch; and the milk of a mare. Since there is no satisfaction made on account of them.—*Dimetian Code*, 215.

There are three excitements to revenge: screaming of female relatives; seeing the bier of their relation, and seeing the grave of their relation without atonement.—*Dimetian Code*, 216.

The three vexations of the wise are ebriety, adultery, and bad temper.—*Dimetian*; also *Gwentian Code*, 384.

Three private intercourses which the king is to have without the presence of his judge: with his wife; with his priest, and with his mediciner.—*Dimetian*.

There are three secrets better to be disclosed than concealed: treason and losses to the lord; waylaying and a person killing his father or his mother, if disclosed in confidence.—*Dimetian*.

A mill and a wear and an orchard are called the three ornaments of a kindred, and those three things are not to be shared nor removed, but their produce shared between those who may have a right to it.—*Venedotian*, 87.

Three lengths of a barley-corn in the inch; three inches in the palm breadth; three palm breadths in the foot; three feet in the pace; three paces in the leap; three leaps in a land. The land in modern Welsh is called a ridge; and a thousand of the lands is a mile.—*Venedotian*, 90.

There are three things under cover in the palace: a mead vat, and a sentence and a song before it is shown to the king.—*Dimetian*, 222.

Three things which protect a person against a summons to pleadings: the shouting and sound of horns before a border country host; flood in a river, without a bridge and without a cobble; and sickness.—*Gwentian*; also *Miscellaneous*, p. 554.

Three persons who will reduce a country to poverty: a prevaricating lord; an iniquitous judge, and an accusing maer.—*Gwentian*, 385.

The "Ancient Welsh Laws" is one of the series of publica-

tions authorized by a vote of the House of Commons passed so far back as in 1822, under the title of the "History of Britain." The originator of this series, the late Mr. Petrie, died but a few weeks since, and did not live to witness the publication of even the first volume of his own portion. Almost simultaneously with the publication of the "Ancient Welsh Laws," the "Ancient Laws and Institutes of England, consisting chiefly of Anglo-Saxon Laws," were published: we had purposed to treat both together, but our limits are already exhausted, and the latter must be left for another opportunity.

H. C.

ART. III.—LIFE OF SIR WILLIAM GRANT.

THE lineage and name of Grant are of the highest antiquity and consideration in Scottish annals. In a singular work published in 1795, intituled "*Memoires Historiques, Généalogiques &c. de la Maison de Grant, tant en Ecosse qu'en Normandie, en Allemagne, en Suède, en Dannemarc, &c. par Charles Grant, Vicomte de Vaux*," the author, a French emigré, but hearty clansman, traces the name by its etymology to the French Le Grand, and enumerates, among the worthiest modern scions of the house, "*Monsieur William Grant, membre du Parlement Britannique*." Lion King of Arms, he informs us, can certify the greatness of this powerful, ancient and numerous race. The descent from former renown to the obscure branch of the family, from which this great lawyer sprung, is like tracing a mighty stream into its creeks and shallows.

William Grant, descended from the Grants of Baldornie, was born at Elchies, on the banks of the Spey, in Morayshire, in 1755. His father had been a small farmer in that county, but migrated soon after his birth to the Isle of Man, where he filled the office of collector of the customs. Both his parents dying when he was very young, the care of his education devolved on an uncle, a wealthy merchant of London, and afterwards proprietor of Elchies, who discharged his duty well. The boy William was brought up, together with a younger brother, who afterwards became a collector of customs at Martinico, at the grammar school of Elgin, and boarded

at the house of Mr. John Irvine, nephew to the minister. The grateful scholar contributed largely to the rebuilding of the school house thirty years later, when the "old house at home" required ample funds for its restoration. Having completed his schooling at the old college of Aberdeen, he was sent to pass two years at Leyden, which had not yet wholly lost its ancient renown, that he might perfect his studies in the civil law.

Our province of Upper Canada being supposed to offer an open and unoccupied field to a clever lawyer, to whom an early return for the little capital invested in his education was a pressing object, young Grant sailed for that country in the autumn of 1775, and arrived at Quebec just before the critical period when it was threatened with a siege by the American general Montgomery, and when, on the death of that general, Colonel Arnold attempted to take it by a coup-de-main. There are several examples of eminent lawyers who have been previously distinguished in the military profession; "the same person," says an eloquent author, "may certainly, at different periods of life, put on the helmet and the wig, the gorget and the band, attend courts and lie in trenches, head a charge and lead a cause." It was reserved for le Chevalier Grant, however, to doff one head dress and don the other—to perform both duties, military and legal—on the same day. He assisted at the fortifications, and was active in the labours of a volunteer. When the alarm from invasion ceased, and the harassed province was restored to comparative tranquillity, his duties as a lawyer were scarcely less multifarious. He had left England before completing the requisite number of terms for a call to the bar, but was appointed, by the fiat of the governor, Attorney General of Canada, an office of loftier sound than of real dignity or emolument. The preferment, for which indeed there were few competitors, was most happily bestowed, as none but first-rate talents could have extricated the administration of the laws from inextricable confusion. Strange to say, the municipal code, by which this conquered colony was to be governed, had not yet been decided. A proclamation of 1763, drawn up in the vague language of a soldier, provided for the administration of justice "*as near as might be*" ac-

• cording to the law of England. It was a matter of great and long-continued discussion whether the laws of England had thereby been generally introduced, in abrogation of the ancient municipal laws of the country. In a report made by the attorney and solicitor general, in 1766, little other effect was ascribed to this proclamation, than that of extending to the inhabitants of Canada the benefit of the criminal law of England, and those learned persons were of opinion that the English laws relating to the descent, alienation, settlements, and incumbrances of real estates, and to the distribution of personal property in case of intestacy, could not be considered in force in that country. The question, however, never received any judicial decision.

For eight years Mr. Grant continued to diffuse his legal knowledge and acumen through this chaotic mass, and then, sighing for a more ample arena and more worthy antagonists, returned to England. In 1787, in his thirty-third year, he was called to the bar by the benchers of Lincoln's Inn. His reputation as a colonial barrister had been divided from the metropolis by three thousand miles of Atlantic ocean, and the transit of intelligence was then remarkably slow. The quondam attorney general of Canada, unknown beyond the circle of his profession, with a haughty consciousness of unappreciated desert, too proudly sensitive and reserved to win the captious favour of attorneys—for the law,

“ Like woman, born to be controll'd,
Stoops to the forward and the bold”—

during four long years of enforced silence and leisure, plodded his weary way, in singular contrast to a former active life, first through the western, and afterwards the home, circuit, without holding a single brief of his own. But though more absolutely forlorn than several of his great competitors, Mr. Grant's fate was far from peculiar. The future premier, Pitt, the future chancellor of Ireland, Mitford, the future chief commissioner Adam, and the future Master of the Rolls, might have met at the circuit table, and been rarely interrupted by a summons to a consultation.

Mr. Grant appears to have been a pleased, if not active, participator in the *high jinks* of grand court. In an extract from the Diary of Blair Adam, in Lockhart's Life of Scott,

the chief commissioner concludes an account of their rival festive recollections with the remark, that "if Scott could describe, with inconceivable humour, their doings, when emerging from boyhood, Shepherd and I could tell of our circuit fooleries, as old Fielding, the son of the great novelist, called them—of the circuit songs which Will. Fielding made and sung, and of the grave Sir W. Grant, when a briefless barrister, ycleped by Fielding the Chevalier Grant, bearing his part in these fooleries, enjoying all our pranks with great zest, and who talked of them with delight to his dying day."

Uneventful as the life of an obscure barrister must be, for he is only called a practising barrister by courtesy, there is one point in his career, which, to professional readers, seems fraught with all the interest of romance—the happy incident well improved, the lucky chance which unexpectedly befel, "the tide which taken at the flood led on to fortune." Void of stirring adventure as their days must be when toiling in the ranks, what legal reader can trace without some degree of emotion, as he may make their case his own, the sanguine ambition and buoyant confidence of the outset—the gradual unfolding of difficulties before unseen—the experience of tedious delays and heart-sickening disappointments, not seldom of severe personal sufferings and privations—at length the despairing resolution half-conceived by the stricken lawyer to abandon his thankless calling, and then, when all around appeared darkest, the sudden opportunity caught, and a speedy transition into the meridian of fortune and fame. There may be some truth in the complaint of a fastidious baronet, that, after wasting years miserably in the noxious air of hot unwholesome courts, and listening for long weary days to an insufferable quantity of dull nonsense, success is at length secured by accident; but the chance is worth waiting for, and to every able and persevering lawyer this time will come.

The "open sesame" to Mr. Grant was an interview with the premier, at his request, as he was then preparing his bill for the regulation of the Canadas. The clear and enlarged manner in which the ex-attorney general furnished Mr. Pitt with the fruits of his experience, caused that perspicacious minister to seek other opportunities of intercourse, and to

intimate that if a gentleman so well versed in municipal law desired a seat in the House of Commons, a private borough would be at his disposal. He at once embraced the offer, and was returned, for Shaftesbury, to that important parliament which met in November, 1790. He was elected burgess for Windsor, through court influence, to the next parliament, and afterwards sat for Banffshire, till his final secession from political life in 1812.

His example and eminent success prove the futility of all abstract general rules. There is no precept more chorussed by the voice of the profession, than the impolicy of a young lawyer, comparatively unknown, entering parliament, and a long muster-roll of legal names are enunciated, who have bitterly regretted the hour that they forsook their lawful wife the profession, for that fascinating but impoverishing mistress, politics. "Remember," was the cautious advice of an old stager, Grauville Sharp, "if you should abandon your Penelope and your home for Calypso, that I told you the counsel given, in my hearing, at different times, to a young lawyer, by Mr. Windham and Horne Tooke, not to look for a seat till he had pretensions to be made solicitor general." The precept is, doubtless, marked by worldly wisdom, and savours of the shrewd common sense of those who gave it, yet was it in direct contradiction to the practical experience of the most successful lawyer in the House. That light was first kindled in St. Stephen's, which was afterwards reflected with such dazzling lustre on the oracle of Westminster Hall.

For some time after taking his seat, Mr. Grant seemed content with the condition of the *pedarius senator*, as if he had no higher ambition than to hear the debate, give his vote, and then depart in peace. But he was calmly awaiting the fittest opportunity for a triumphant essay: on the 15th April he followed Windham in the debate respecting the armament against Russia, defending Pitt's private interference against the retention of Ockzakow, or Otchakov—a town with whose very name and topography the greater part of the House were only imperfectly acquainted, and obliging the premier by his advocacy, on a point where it was especially needed.

"Popular assemblies were likely to be corrupted in negotiations. The necessary consequences of negotiations in the hands of nu-

merous bodies, from the popular assemblies of Athens to the Polish diet, ever had been, and ever would be, the publication of what ought to be secret; intrigues, dissensions, cabals, and the interposition of foreign influence."

"An honourable baronet had said, that the instant the country was put to any expense, the House was bound to inquire for what purpose, and he had given a sort of challenge to the House, and had defied any gentleman to produce a single instance where they had been called upon for supplies without previous explanation. It so happened that he recollected a case precisely in point: on the 17th March, 1718, the king sent a message to the House, stating in the most general terms possible, that he was carrying on several negotiations of the utmost concern to the welfare of these kingdoms and the tranquillity of Europe, and calling upon the House for supplies to enable him to carry them on with effect. In that case, without any information farther, the House had voted supplies; but no person thought of withholding the necessary confidence from the servants of the crown."

Such passages as these will present a very faint and feeble resemblance of the great orator. There is the stature indeed (to draw a sculptor's illustration), but where is the grace? the shape, but where is the mein? the features, but where is the eye? The art of reporting has improved in exact proportion as the necessity for its exercise appears to be diminished; however much the reader may lament over the shapeless fragments and scanty relics, all that is left to him of former eloquence, he would probably prefer their Roman names and curt paragraphs, to the effusions of modern senatorial garb.

In the following month Mr. Grant opposed Fox on the Canada Government Bill, and explained the Code Marchand, bringing both his civil knowledge and practical experience to bear upon the critical question, whether the provinces of Canada should enjoy an English or a French constitution. When Mr. Whitbread, in February 1792, renewed his motion respecting the armament against Russia, Mr. Grant's rank and consideration in the House had so increased, that he followed Mr. (now Earl) Grey in the debate, no unworthy successor, certainly not "*impar congressus Achilli*," and was himself replied upon by Windham, who said it was a pleasure to follow the learned gentleman, notwithstanding his great

ability, because he put the question on ground on which it could be fairly met. His apt and pertinent illustration from Grecian history called forth an elaborate explanation from the mighty leader of opposition, and elicited deserved applause.

"He was reminded of the history of Philip of Macedon and the Athenians, and particularly his famous letter to them, in which he expressed his sentiments of justice and moderation, and in which he gave assurances of his good disposition to the liberty of Greece; but solicited some small towns, which the Athenians granted, many of them saying they were so obscure, and of so little value to them that they did not know even their names. 'True,' said Demosthenes afterwards, 'you did not know the names of these small towns, but they were keys to provinces, to which Philip will find his way, and endanger your liberty.' Philip passed from town to town, and from province to province, until at last he had the dominion of all Greece. So in this, the empress might profess moderation, and add fortress to fortress, until she became mistress of the Mediterranean and Egypt. At the same time he could see distinctly, that important as Oczakow might be, it might not be worth a war under the peculiar circumstances with which a war must have been carried on against Russia. With regard to the right honourable gentleman having put the country to the expense of an armament, purposely to keep Oczakow out of the hands of Russia, and yet having given it up, that was by no means a matter that might not be amply justified. Many points had been again and again given up by negociators, not only after armaments had been set on foot, but after battles had been fought, and victories actually obtained. Instances might be quoted in almost every reign, wherein objects had been relinquished that were deemed of great importance at first, and to obtain which great national expense had been incurred."

As the closing year grew dark with the French revolution, Mr. Grant's voice was potential for war. When, in December, 1792, Mr. Fox moved for an embassy to Paris, Mr. Grant rose, after Whitbread, and maintained, with great learning, the right of Holland to control the navigation of the Scheldt, and the arrogance of the interference of France, which proved only their rooted contempt of existing order and moral obligation. "They had not conquered the Netherlands by their own declaration, they had only restored the sovereignty of the people! Should France then be suffered to

arrogate to itself the umpirage of all disputes in Europe? Even were we to settle the dispute with the present executive council, their successors, armed with the natural inprescriptible rights of man, would deny their right to settle it. What! they would exclaim, bind by treaty the rights of man! It is impossible, nature forbids it, right is paramount to treaty. Those with whom you negotiated exceeded their power, and betrayed their constituents, and the treaty is therefore void."

This passage forms a mere Torso of the pleader's eloquence, but the interest of it has not passed by; it may yet be referred to as an earnest apology of the war, and deserves to be incorporated in the records of national wisdom. Well might the reserved premier, who rarely complimented, praise the able and luminous point of view in which his opinions had been placed by his learned friend. It has been said by the greatest living model of parliamentary eloquence (Lord Brougham) that, with the exception of Mr. Pitt, perhaps no man had ever greater personal sway in the House than Grant. The following is that nobleman's estimate of his power as an orator.

"In parliament he is unquestionably to be classed with speakers of the first order. His style was peculiar;—it was that of the closest and severest reasoning ever heard in any popular assembly; reasoning which would have been reckoned close in the argumentation of the bar, or the dialectics of the schools. It was from the first to the last, throughout, pure reason and the triumph of pure reason. All was sterling, all perfectly plain; there was no point in the diction, no illustration in the topics, no ornament of fancy in the accompaniments. The language was choice—perfectly clear, abundantly correct, quite concise, admirably suited to the matter which the words clothed and conveyed. In so far it was felicitous, no farther; nor did it ever leave behind it any impression of the diction, but only of the things said; the words were forgotten, for they had never drawn off the attention for a moment from the things; these things were alone remembered. No speaker was more easily listened to; none so difficult to answer. Once Mr. Fox, when he was hearing him with a view to making that attempt, was irritated in a way very unwonted to his sweet temper by the conversation of some near him,

even to the show of some crossness, and (after an exclamation) sharply said, ‘do you think it so very pleasant a thing to have to answer a speech like *that*.’ The two memorable occasions on which this great reasoner was observed to be most injured by a reply were in that of Mr. Wilberforce, quoting Clarendon’s remarks on the conduct of the judges in the Ship Money Case, when Sir William Grant had undertaken to defend his friend Lord Melville; and in that of Lord Lansdowne (then Lord Henry Petty), three years later, when the legality of the famous orders in council was debated. Here, however, the speech was made on one day, and the answer, able and triumphant as it was, followed on the next. His rare excellence was no doubt limited in its sphere; there was no imagination, no vehemence, no declamation, no wit; but the sphere was the highest, and in that highest sphere its place was lofty. The understanding alone was addressed by the understanding, the faculties that distinguish our nature were those over which the oratory of Sir William Grant asserted its control.”

Upon such an eloquent champion of the best, and able defender of the least popular, measures of government, legal honours must overflow. In 1791 he was appointed a Commissioner with Sir John Nicholl to report on the laws of Jersey—a sure, though slight, indication of ministerial favour. Higher preferments speedily followed. In 1793 he was appointed one of the judges for Carmarthen, Pembroke, and Cardigan, a sort of mezzo termino between the front row of the counsel and the bench. The smiles of the minister recommended the judge to the favour of parliamentary agents. His profound acquaintance with the principles of the civil law, and the lucid reasoning with which he argued Scottish appeals at the bar of the House of Lords, drew down upon him the favourable notice of the Chancellor—

“The rugged Thurlow, who, with sullen scowl,
In surly mood, at friend and foe would growl:”

he is said to have marked the logical utter-barrister as a future chancellor. The prophecy would be worth more, were it not so profusely hazarded, and so often remembered to have been spoken after the event. A more important mark of esteem

was the grant of a silk gown in 1795 by Lord Loughborough, given at a time when his amount of professional business scarcely warranted the distinction, accompanied with a recommendation, to which the king's counsel found no difficulty in acceding, that he would in future confine his practice to the Court of Chancery. His number of clients increased steadily after this promotion, and fully entitled Mr. Grant, apart from court favour, to those honours which, when once in the path of promotion, crowded rapidly upon him. In the same year he was chosen Solicitor-General to the queen, in 1798 Chief Justice of Chester, and in 1799, upon the ennobling of Sir John Scott and his transfer to the Common Pleas, Solicitor-General. His two years of office were distinguished by only one important state trial—that of Hatfield for shooting at the king. Sir John Mitford having opened the case, it became the duty of Sir William Grant to reply, had not the eager humanity of Lord Kenyon interposed to stop the trial, upon that most ingenious and eloquent plea of monomania, which Erskine set up. We should have much desired a record of the solicitor's opinions upon that interesting and mysterious theme, especially as he is known to have entertained doubts as to the soundness of the conclusion at which that excellent judge arrived.

Husbanding his strength in parliament for great occasions, Sir William Grant supported the address of thanks, in 1801, with an energy of eloquence to which the reporters have for once done justice. It would be unfair to his memory not to transcribe a portion of the vehement scornful sentences which he poured forth on the disheartening counsels of the opposition, and the abject *Gallicism* of their leader, Mr. Grey.

“ If we are in earnest in wishing that the country may display an energy proportioned to the difficulties with which it has to surmount, what is the conduct which as rational and consistent men we ought to hold? Ought we deliberately to endeavour to disappoint our own wishes—to lay plans for frustrating our own hopes—to labour to dishearten and disunite those on whose union and courage our safety wholly depends? And yet is not this the preposterous course which the honourable gentleman has been pursuing? Has he not held out to our view the most gloomy pictures of our situation and resources? Has he not exaggerated every difficulty and

magnified every danger? Has he not drawn such a comparison between the power of the enemy and that of this country, as almost to exclude the hope of a successful issue to the contest in which we are engaged? In the name of common sense, what can gentlemen propose or promise to themselves from this strange application of their eloquence? Supposing they should completely succeed in persuading the people to distrust their government, their strength, their resources, and to admire and dread the enemy with whom we have to contend, I wish to know what advance they think they will have made towards bettering our condition, towards increasing our strength, towards improving our security? What should we think of the commander of an army, who, on the eve of an engagement, should employ all his eloquence to dispirit his men, who should inculcate cowardice, and propagate dismay, who, by magnifying the powers of the enemy and the danger of the conflict, should incite his troops to flight or to submission? We should say that such conduct was the extreme of treachery or folly. For God's sake, let no part of this community expose itself to either imputation. . . .

"I wish to God that all the upper classes of life would display the same sober fortitude that has characterized the lower orders of the community. They have real and serious evils to struggle with and to endure. There are those who are obliged to task their imaginations for subjects of complaint, which, if they would confess the honest truth, never broke in upon one moment of their repose, or robbed them of one particle of their enjoyments; yet, not content with giving vent to their own mock lamentations, they are angry that those who really suffer should show any degree of patience under their sufferings, and should not be ready to break out into insurrection against that government which is exerting its utmost for their relief. But in spite of excitement and example, the British people still retain their ancient characteristics; they have not yet been prevailed upon to clamour for the ruin and disgrace of their country under the vague and deceitful name of peace; they would not, I am persuaded, purchase a relief from the distresses of the moment by the sacrifice of their country's honour; they would not consent to become tributaries to France, even if France should undertake to dole out to them a daily allowance of bread for the remainder of their lives. Propose that relief to them, on those terms, and I am certain they would refuse to sell, for a mess of pottage, the birth-right of their independence."

The constitution being saved, and the country, though still firm and patient, growing utterly weary of a war whose inter-

minable disasters on the continent outweighed our triumphs on the ocean, Mr. Pitt determined to resign, that other ministers might traffic for and barter that peace to which, as inglorious, he could not teach his lofty spirit to submit. With his retirement important law changes were interwoven, amongst them the transference of Sir Pepper Arden, with a title, from the Rolls to the chief seat in the Common Pleas. Sir William Grant, with the unanimous approval of the profession, was, 30th May 1801, appointed his successor. In the last six years he had been wearing his legal honours as nobly as he won them, arguing *Thelluson's* case, in which he rebuked the cravings of posthumous avarice, and other important suits in Chancery, with a range and clearness of reasoning which riveted universal attention. Those best initiated in the mysteries of law craft looked forward with sanguine hope to the career of the new judge, and even the greatest enthusiasts were not disappointed.

The bubble of peace soon burst, and Sir William Grant was not permitted to retire uninterruptedly to the tranquil duties of the bench. By a somewhat curious coincidence, the learned Master of the Rolls found himself once more constrained to diversify the labours of *Themis* with those of war. The bulletin of his exploits, which consisted in constant drilling, is best told in the words of one of his company, the amusing anecdotist, Mr. Espinasse.

"The Lincoln's Inn corps was formed when all ranks of the people were arming, not wholly composed of members of the bar, or attornies, but admitted into its ranks every description of respectable persons in any way connected with the profession; of this description were the officers of the Court, and the stationers and their clerks employed in professional business in the neighbourhood of the inns of Court. Sir William Grant, then Master of the Rolls, was chosen to command us; he was selected for that honourable post, it being understood that he had been attorney-general of Lower Canada, and carried arms at the siege of Quebec, when it was invested by the American general, Montgomery. He took the title of major-commandant; and our other officers were, the Honourable Henry Legge, Templeman, and Pitcairne. We mustered about seventy, and numbered among us Lords Redesdale and

Ellenborough, Sir Vicary Gibbs, and Dampier; the heir-apparent of Lord Kenyon also deigned to fall into the ranks. The members of the bar usually formed the front rank, though neither the best looking soldiers nor best drilled recruits. Dampier was always the right hand file of the line; he stood (to use a soldier's phrase) six feet two or three inches in his stocking feet, and stepped like a castle. Lord Redesdale was always my left hand file, and was one of the most regular at the drill of any of the company."

Mr. Espinasse tells an amusing story of one recruit, a Mr. Stebbing, who had been accustomed to sit as a commissioner of bankrupts in a cocked hat, and was compelled to quit the regiment by the commandant's regulations as to dress. "The hats of the Lincoln's Inn corps were round, surmounted with black bearskin across the crown. A tall red and white feather, composed of the hackles of a cock, rose in the front of it, and presented a martial and grenadier-like appearance. But all that military gaiety had no charms for Stebbing; he could not be reconciled to a round, but pined for his pinch; he never on coming to the parade omitted his malediction against the bad taste of Sir William Grant, and the martial ornament, with which he had chosen to furnish his head. His regrets became insupportable. Notwithstanding the talents of our commanding officer, and the rank of many of the privates, our military character was not splendid, and we merged into the Law Association, commanded by Lord Erskine."

Before accompanying the Master of the Rolls, a sort of judge-martial, to his more peaceful, enduring, and triumphant labours on the bench, it may be well to return with him for a short time to the House of Commons, of which he still continued the grace and ornament. The first great speech made by the learned judge, contrary to what might have been anticipated from his warlike associations, was in defence of the definitive treaty of peace, in the course of an earnest apology for which he asserted, with less than his wonted prudence, "that the possession of the West India Islands, so far from increasing the means of this country, brought with it rather weakness than strength, and divided our means and our resources." This unexpected ebullition of liberalism elicited a singular

realm, and no evil was found to result therefrom. There had been two attempts to graft a measure of the nature now before the house upon the English code, the one by the late Lord Kenyon, and the other by another most eminent lawyer, Mr. Ambler, but both these luminaries of the law, upon mature deliberation, abandoned the measure, as being unsuited to the genius and manners of the people."

Canning compared the measure to a law which had been introduced for the regulation of country bankers, by making their estates liable to their debts; Lord Kenyon had observed upon that measure, that it would be necessary every banker should have a map of his estate, and catalogue of the encumbrances on it hung up in his house. Sir Samuel Romilly, then Solicitor-General, replied with as much asperity as if he had sustained some personal wrong.

"He was decidedly of opinion, that to exempt an estate from the payment of debts contracted by its late possessor, was a most flagrant act of injustice. He was surprised there were those who maintained that such an exemption was just, and somewhat concerned, that among them was the only member of that house who was invested with the robes of magistracy."

The passages in Romilly's Diary, in which that great lawyer and philanthropist notes down, at the moment, his own vivid impressions of the debate, are full of interest, and, whilst they mark the extreme sensitiveness of both antagonists, read an admirable lesson to senators of the necessity for charitable judgment, and for mutual forbearance with one another.

"18th February, 1807.—The second reading of the bill to make freehold estates pay debts came on to-day. The Master of the Rolls, to whom I had sent a copy of the bill before I moved for leave to bring it in, and to whom I mentioned my intention before I sent him the copy, and who had never stated any objection to it whatever to me, opposed it on the ground that there was no pressing necessity for the measure—that a simple contract creditor not having stipulated that the debt should be paid by the heir of the debtor, there was no reason to give him what he had not contracted for, and that as the heir was not affected by it, it was unjust to give it him—that it was contrary to the Statute of Frauds, because it would affect lands by means of parol evidence, without any

writing, and on some other grounds of equal solidity. He and Canning did not divide the house."

The bill was finally rejected on the third reading, by 69 to 47, on which its author writes this note:

"18th March. — The principal opposer of the bill was the Master of the Rolls, who, in a long, studied, and elaborate speech, exerted all his powers to throw it out. His arguments were all technical, and such as I could not have conceived could have satisfied himself. He said, that justice in such a case was entirely out of the question: expediency was all that was to be considered. He spoke of the injury that would be done to the innocent heir at law, and of the heir's right to the real property of his ancestors as that which ought not to be disappointed by the claims of creditors. He talked, too, of the dangers of innovation, of the mischief of enacting any law without considering all the consequences to which the principle on which the law proceeded would lead. My reply to him was, perhaps, in some parts of it, more severe than it should have been; amongst other things I said, that 'I was surprised and lamented to hear some of the propositions which he had stated, and the rather, as coming from one who was the only person that appeared amongst us invested with the robes of magistracy.' 21st. — I received a letter to-day from the Master of the Rolls, complaining of my conduct towards him in the late debate, and I have written him an answer, which I shall send to him, apprising him what it is that I think I had great reason to complain of in his conduct, and what I meant certainly to resent. He has used me most unkindly, and, I think, has acted in a manner unworthy of himself; but I have no desire to be at enmity with him, or indeed with any man."

There can be no doubt that the judge's inveterate antipathy against innovations, and his lurking suspicion of some evil, then unforeseen, that would assuredly arise from any change in the ancient landmarks of the law, exposed him, with some show of reason, to the resentment of grave, and the irony of satirical, reformers. Lord Brougham animadverts, on this occasion, "upon a discrepancy in the purely intellectual picture, a want of keeping, something more than a shade. The commanding intellect, the close reasoner who could overpower other men's understanding by the superior force of his own, was the slave of his own prejudices to such an extent, that he could see only the perils of revolution in any reformation of our institutions, and never conceived it possible that the monarchy could be

safe, or that anarchy could be warded off, unless all things were maintained upon the same footing on which they stood in early, unenlightened, and inexperienced ages of the world. The signal blunder, which Bacon long exposed, of confounding the youth with the age of the species, was never committed by any one more glaringly than by this great reasoner. He it was who first employed the well-known phrase of "the wisdom of our ancestors;" and the menaced innovation, to stop which he applied it, was the proposal of Sir Samuel Romilly to take the step of reform, almost imperceptibly small, of subjecting men's real property to the payment of all their debts. Strange force of early prejudice; of prejudice suffered to warp the intellect, while yet feeble and uninformed, and which owed its origin to the very fault that it embodied in its conclusions the making the errors of mankind in their ignorant and inexperienced state the guide of their conduct at their mature age, and appealing to those errors as the wisdom of past times, when they were the unripe fruit of imperfect intellectual culture.

However averse to civil changes, the humanity of Sir William Grant induced him to give a warm and effective support to another favourite measure with Sir Samuel Romilly, his amelioration of the criminal code. The statute law was then rife with capital punishments, and its prompt despatch with a criminal was to hang him.

" — huic atro liquuntur sanguine guttæ,
Et terram tabo maculant."

With his usual sound judgment and charitable wisdom, he supported Romilly's Privately Stealing Bill, (abolishing the punishment of death for stealing in a shop, where the article stolen amounted to one shilling.)

"Even the sanctity of the jurymen's oath was sometimes obliged to yield to the feelings of nature, and they were guilty of what had sometimes been called a pious perjury to acquit a prisoner. The fault was in the law as it now stood, for every law must be faulty which acts so decidedly against the feelings of the whole community."

With the reserve peculiarly becoming in a judge, the Master of the Rolls never interfered in political discussions but on those state occasions "big with the fate of" ministers, when

the crisis exacted an expression of opinion from each patriotic citizen, and the difficulty appeared to be worthy of his attempt at solution. At such times he spoke out boldly, fully, freely, his high Tory tenets. When "All the Talents," after their dismissal from office in April 1807, appealed to the House, and a motion was made for an address to the crown, that the House had seen with the deepest regret the late changes in his majesty's councils, the Master of the Rolls, at five o'clock in the morning of a protracted debate, opposed the motion with convincing eloquence, and confuted Windham's ridicule of exploded notions with regard to any invasion of the prerogative.

"Never, until now, had a minister come down to complain of his sovereign. Lord Somers was removed without a shadow of complaint. Did he come down to parliament to institute an investigation of the cause? When the celebrated Whig administration was removed by Queen Anne, did they breathe a whisper in either House of Parliament against their royal mistress? If a minister were to reserve to himself the right of inquiring into the cause of his removal, he would approximate his situation to that of a judge, or any other officer for life. Of a change in administration parliament had no constitutional knowledge, and on such change could found no inquiry."

So completely at variance was the Master of the Rolls with the late ministry, that during their continuance in office he withdrew himself entirely from the Courts of Prize Appeal, over which he had previously presided, assisted by Sir William Wynne, deeming his attendance a voluntary mark of respect to the government, which he felt no inclination to pay. He did not again interpose till the period of the charges against the Duke of York, when the House seemed likely to run riot in their horror of supposed corruption, and lent too credulous an ear to the bland yet bitter falsehoods of Mary Anne Clarke. His voice was then raised in a tone of judicious caution, not unmingled with irony: "A Roman tribunal had refused to take even the testimony of Cato without the sanction of an oath, and certainly they had had persons at their bar not much akin to the Roman or Athenian virtue. The reason why it was not thought necessary to give the House of Commons the privilege to administer an oath was, that their inquiries were

supposed to be directed to ascertain the grounds of accusation preparatory to the institution of a subsequent trial."

After a silence of two years, Sir William Grant spoke for the last time—in favour of the resolutions respecting the Regency, avowing his deep reverence for the author of the resolutions of 1788. He resumed his seat amid tumultuous cheering. It was in vain that Sheridan in reply exerted his winning powers of pleasantry, and ridiculed the phantom of Lord Thurlow, supported by the ghost of Mr. Pitt, which the Master of the Rolls had conjured up. He could not disenchant his hearers from their impression of a speech to which, according to his own confession, they had listened

"With breathless silence and a dead repose."

At the dissolution of parliament in 1812, the greatest and most approved forensic orator since the days of Murray withdrew from political life. He has had one successor of almost equal eloquence and consideration, Sir John Copley, with whom the race of Masters of the Rolls in the House of Commons seems likely to expire. There still runs a strong under-current of prejudice against any judge being a member. We should deprecate their exclusion, as tending to lower the standard of debate. Sir William Grant is an eminent example how much practical benefit their presence may accomplish.

Of his merits as a judge it is difficult to speak but in superlatives—to use any other terms, even at the risk of flattery, than those of unalloyed encomium. Learning the most profound, sagacity almost intuitive, a power of analysis most logical and searching, a diction perfect in its aptness, entire calmness, patience, and courtesy, contributed to the varied attributes of a judge rarely equalled, never surpassed. His popularity with the profession was unbounded. Almost every day supplied some new offering to his praise, or token of homage, like the rich bouquet of flowers placed each morning on the Chancellor's cushion. The lover's panegyric on his mistress is not more lavish than the lawyer's tribute to his model of judicial excellence. We prefer selecting two of these in all their freshness, to any praise of our own: the first by the late Charles Butler, the second by Lord Brougham.

"The most perfect model of judicial eloquence which has come under the observation of the reminiscents is that of Sir

William Grant. In hearing him, it was impossible not to think of the character given of Menelaus by Homer, or rather by Pope, 'He spoke no more than just the thing he ought.' But Sir William did much more; in decompounding and analyzing an immense mass of confused and contradictory matter, and forming clear and unquestionable results, the sight of his mind was infinite. His exposition of acts, and of the consequences deducible from them, his discussion of former decisions, and showing their legitimate weight and authority, and their real bearings upon the point in question, were above praise; but the whole was done with such admirable ease and simplicity, that, while real judges felt its supreme excellence, the herd of hearers believed that they could have done the same. Never was the merit of Dr. Johnson's definition of a perfect style, 'proper words in proper places,' more sensibly felt than it was by those who listened to Sir William Grant. The charm of it was indescribable; its effect on the hearers was that which Milton describes, when he paints Adam listening to the angel after the angel had ceased to speak. Often and often has the reminiscence beheld the bar listening at the close of a judgment given by Sir William, with the same feeling of admiration at what they had heard, and the same regret that it was heard no more!"

When we think of the dark little Court out of Chancery Lane, in which Sir William Grant pronounced at night his decisions, and picture to ourselves the forlorn group of jaded counsel and anxious clients, expecting the solution of an obscure clause in a will, or whether the testator's effects should go into hotchpot, we cannot but marvel at the buoyant fancy of the old conveyancer, soaring to the raptures of Milton's Paradise, and instituting a comparison between two things so dissimilar as the wigged man of law, and Adam, and the angel. The eulogy of the late Chancellor, if not quite so imaginative, is equally fervid. After commentating on the comparative obscurity of the Master of the Rolls when raised to the bench, he adds:

"The genius of the man then shone forth with extraordinary lustre. His knowledge of law, which had hitherto been scanty, and never enlarged by practice, was now expanded to whatever dimensions might seem required for performing his high office; nor was he ever remarked as at all deficient, even

in the branch most difficult to master without forensic habits, the accomplishments of a case lawyer, whilst his familiarity with the principles of jurisprudence, and his knowledge of their foundations, was ample, as his application of them was easy and masterly. The Rolls Court, however, in those days, was one of comparatively contracted business, and although he gave the most entire satisfaction there, and in presiding at the Privy Council in prize and plantation appeals, a doubt was always raised by the admirers of Lord Eldon, whether Sir William Grant could have as well answered the larger demands upon his judicial resources, had he presided in the Court of Chancery. That doubt appears altogether unfounded.

“He possessed the first great quality for despatching business (the *real* and not *affected* despatch of Lord Bacon), a power of steadily fixing his attention upon the matter before him, and keeping it invariably directed towards the successive arguments addressed to him. The certainty that not a word was lost deprived the advocate of all excuse for repetition; while the respect which his judge inspired checked needless prolixity, and deterred him from raising desperate points, merely to have them frowned down by a tribunal as severe as it was patient. He had not indeed to apprehend any interruption; that was a course never practised in those days at the Rolls or the Cockpit; but, while the judge sat passive and unmoved, it was plain that though his powers of endurance had no limits, his powers of discriminating were ever active, as his attention was ever awake; and as it required eminent hardihood to place base coin before so scrutinizing an eye, or tender light money to be weighed in such accurate scales as Sir William Grant’s, so few men ventured to exercise a patience, which yet all knew to be unbounded. It may indeed be fairly doubted whether the main force of muscular exertion, so much more clumsily applied by Sir John Leach in the same Court to effect the great object of his efforts—the close compression of the debate—ever succeeded so well, or reduced the mass to as small a bulk, as the delicate hydraulic press of his illustrious predecessor did, without giving the least pain to the advocate, or in any one instance obstructing the course of calm, deliberate and unwearied justice.

"The Court in those days presented a spectacle which afforded true delight to every person of sound judgment and pure taste. After a long and a silent hearing—a hearing of all that could be urged by the counsel of every party—unbroken by a single word, and when the spectator of Sir William Grant (for he was not heard) might suppose that his mind had been absent from a scene in which he took no apparent share, the debate was closed—the advocate's hour was passed—the parties were in silent expectation of the event—the hall no longer resounded with any voice—it seemed as if the affair of the day, for the present, was over, and the Court was to adjourn, or to call for another cause. No! The judge's time had now arrived, and another artist was to fill the scene. The great magistrate began to pronounce his judgment, and every eye and every ear was at length fixed upon the bench. Forth came a strain of clear unbroken fluency, disposing alike, in most luminous order, of all the facts and of all the arguments in the cause; reducing into clear and simple arrangement the most entangled masses of broken and conflicting statements, weighing each matter and disposing of each in succession, settling one doubt by a parenthetical remark, passing over another difficulty by a reason only more decisive that it was condensed, and giving out the whole impression of the case in every material view upon the judge's mind, with argument enough to show why he so thought, and to prove him right, and without so much reasoning as to make you forget that it was a judgment you were hearing, by overstepping the bounds which distinguish a judgment from a speech. This is the perfection of judicial eloquence, not avoiding argument, but confining it to such reasoning as beseems him, who has rather to explain the grounds of his conviction, than to labour at convincing others; not rejecting reference to authority, but never betokening a disposition to seek shelter behind other men's names for what he might fear to pronounce in his own person; not disdaining even ornaments, but those of the more chastened graces, that accord with the severe standard of a judge's oratory. This perfection of judicial eloquence Sir William Grant attained, and its effect upon all listeners was as certain and as powerful as its merits were incontestable and exalted."

Other testimonies might be added, especially the graceful eulogy of the late Mr. Miller, in his *Treatise on Legal Reforms*; but as even this glowing tribute only repeats the same sentiments in a different form, it might weary by repetition. Unfortunately, from the technical nature of the subjects with which they deal, the intrinsic merits of the judgments, as compositions, are sealed to all but professional readers; their consummate art and perfect ease, every hue of language in its proper gradation, every word in its fitting place, the thoughts and diction forming as it were tones in the general harmony. One extract must suffice as a specimen. It is from his judgment in *Purcell v. M'Namara*, 14 Ves. 113, in which the Master of the Rolls, assisting Lord Erskine, states his reasons for setting aside certain deeds of conveyance, which a gentleman of consideration, a Mr. M'Namara, had most improperly induced some ladies to make in his favour.

"The defendant states, that he obtained from them a deed, the effect of which was, that it depended absolutely upon his pleasure whether they should ever afterwards eat a morsel of bread that should not be the gift of his charity. They by that deed convey to him all the interest they had in the Tortola estate, and any other estate; if any other they had; they assign to him their legacies, which during their brother's life were their only means of subsistence; and enter into personal covenants for payment to him, not merely of any debt of their own contracting, not of a definite debt of any person's contracting, but for payment to him of all sums by him before advanced, or which he should at any time afterwards advance to John Purcell and his sisters, to all, any, or either of them; and the written acknowledgement of any one of them was to be conclusive against all.

"Consider what proportion the brother's debt bore to that of the sisters, supposing them, in 1780, to have owed the sum which was said to be due from them to the defendant M'Namara in November 1783. The brother's debt was upwards of twenty to one. Consider his habits of expense, as represented by the defendant himself. What was this, but converting at once the whole fortune of these ladies into a fund to defray the past and supply the future extravagance of that brother. All the prudent care of their father was at once defeated. All the property, by him so anxiously withdrawn from the power of his son, is at once delivered over to the heedless and incorrigible prodigality of this young man. All that

the sisters had in possession, in expectancy, even the sole provision for their daily bread, is parted with by this deed. They are left completely in the dark even as to the amount of the existing debt, which might have required them the next day to abandon their whole property for the satisfaction of that debt of their brother; and if any thing had been left, their unlimited engagement for the future made it impossible for them afterwards to call any thing their own. There is no *locus penitentiae*, no opportunity allowed to them, conceiving they had done enough for their brother, who would do nothing for himself, to stop short of their own ruin, and reserve the residue. All discretion, what John Purcell was to be permitted to spend, and his sisters were bound to pay, was with the defendant, and he states that he has so exercised that discretion that every shilling of their fortune is exhausted, and they are reduced to depend upon his charity for their subsistence.

“Extraordinary as this deed appears, it was immediately followed by one still more extraordinary, the deed of the 12th of September, 1780; the two sisters reducing their remainder in fee to interests for life, in moieties, without even the benefit of survivorship, and giving the inheritance, in the event of their deaths without issue, to Mr. M’Namara: on one day contracting an indefinite engagement for all their brother’s debts, and on the next making a present to the creditor of all the means they had of fulfilling that engagement. They were placed in this strange predicament; they might have been obliged, in consequence of that transaction, to abandon their estates for life in part satisfaction of Mr. M’Namara’s demand, who, having the inheritance by their gift, might have stripped them of any other property, if they had other property, and might even have thrown them into a gaol for the remainder of his debt; and this upon the extraordinary ground of gratitude and obligation to Mr. M’Namara. Gratitude and obligation to him! Admitting that in taking the deed of the preceding day, which he says he considered himself as bound in duty to his family to obtain, he had only shown a prudent and justifiable attention to his own interest, how was he, by persuading them to sacrifice their interest to his to redeem him from the effects of his imprudence in feeding their brother’s extravagance, entitled to gratitude and remuneration? At the best, he was merely shifting the burthen, the consequence of indulging that extravagance, from himself to them; protecting himself from any loss by exposing them to the hazard of extreme distress. What more could the harshest creditor insist on? There is no instance of deeds so extravagant, so irrational as these are, in

their combined operation! Supposing them to have been executed in favour of a person who could not by direct evidence be proved, or, from the relation in which he stood, be presumed to have had any influence over these parties, it would be impossible for a mere stranger to avail himself of such deeds in a court of equity. The inference arises from the deeds themselves, the inference of undue influence exerted to obtain from these unprotected women that which the defendant had no right to demand, and they had no rational motive to give. Mr. M'Namara at least, in the relation in which he admits, and it is proved, he stood to these ladies, was bound to prevent their executing such irrational and ruinous deeds to any other person; and I am convinced he would have exerted himself for that purpose. It is impossible to suppose that he would have advised or permitted them to give away all their property to another person in this absurd manner. But men's judgments are strangely perverted by their interests. Mr. M'Namara did not see any thing improper in this conduct. On the contrary, he says he was bound in duty to himself and his family to demand the first deed; and the Purcells, in gratitude to him, thought themselves bound to offer him the second."

In the gravity of his judicial tone and bearing, in the complete finish of his decrees, both as to matter and style, and the art of expanding a particular topic into general instruction, Sir William Grant excelled the learned chief of the equity courts, Lord Eldon. The Lord Chancellor loved to be colloquial and interlocutory in his judgments, to interpose a sly quip or jest in the midst of some severe argument, to narrow the case as much as possible to a single, minute, individual point. In the perfect mastery of all chancery precedents, of all that ever had been or was ever supposed to have been decided, and a thorough acquaintance with all matters of form, Lord Eldon is supposed to have left behind his great rival. In quickness and subtlety of apprehension, in the discriminating faculty and ability of arrangement, in the comprehensive grasp of facts, these great judges were nearly equal; but the Chancellor had one fault from which the Master of the Rolls was wholly free—the being addicted to doubts, and distrusting his own original because first impressions, the habit of glancing round the clear horizon, that he might discover a dim speck, and bid the still small cloud

arise. Sir William Grant, on the contrary, adhered with firmness, but without obstinacy, to his own decided conviction. There may now and then be traced a slight symptom of impatience in Lord Eldon, when constrained to reverse a decree of Sir William Grant too promptly made; for the vigour and despatch of the subordinate judge implied a practical disparagement of his own more tardy ratiocination. However lavish of praise upon the Master of the Rolls in general, he would upon such occasions administer a grave though mild rebuke. Thus, in *James v. Dean*, 11 Vesey, 387, where Sir William Grant had pronounced authoritatively, "It is clear that if a man bequeath a lease of the premises he holds on lease, and the lease expires, the legatee is not entitled, though another lease exists at his death;" his decree was reversed after prolonged consideration, Lord Eldon remarking at the first argument—"I feel so much difficulty to say that is the true construction, that I cannot, from deference to his Honor's opinion, deprive the party of the very strong opinion I have against that construction. I feel a strong inclination of opinion upon this question; but I shall not hold any opinion of my own without doubt, where the Master of the Rolls has held directly the contrary."

Again, in a case (*Attorney-General v. Stewart*, 19 Ves. 406), upon the construction of the following bequest:—"The rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts, and in England for bringing up ministers in different seminaries, and other charitable purposes, as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." The case at the Rolls was little argued, but on the part of the Attorney-General was treated as decidedly in favour of the charity; on which his Honor said, "that so far from its being a case upon which there could be no doubt of its being a bequest substantially to charity, he was clearly of opinion that it must be held void for uncertainty; for that, in the first place, two or three vague objects of charity were mentioned, between which so named, and other objects of charity which he professed a design of naming afterwards, the testator expressed a future intention to divide his property;" and asked

how it was possible to say, in the absence of all subsequent specification, what portion the testator intended to give to the purposes he had named, and what portions to those which he intended to name but did not name. How could it appear whether he intended to give a fortieth, or a fiftieth, or a hundredth part to both or either of the purposes mentioned?—therefore declaring “that as well on those grounds, as also from the plain meaning of the clause, as altogether referable to a future specification of particulars never afterwards made, the clause must be decreed to be void for uncertainty.”

Lord Eldon reversed this decision upon appeal, protesting with some warmth of tone and manner against it: “When this cause first came before me to be reheard, I cannot help saying that I felt a considerable degree of doubt attaching itself to a subject on which the Master of the Rolls does not seem to have entertained any; and while the great weight of authority which belongs to every decision of that learned judge rendered me more than usually anxious to be certain of fully comprehending every principle upon which his judgment in this instance could have been founded, I experienced some satisfaction from the information, that he had not had the previous advantage of so full a discussion at the bar, especially on the part of the Attorney-General, as the great importance of the subject appeared to demand. I repeat, that I am sorry for it; because I am very unwilling to differ from any opinion pronounced by so great an authority as that of the Master of the Rolls; but in the present case I find myself driven to say that, in my judgment, this is a bequest to charitable purposes.”

Though the statistics of proceedings in equity should never be too implicitly relied on, some remarkable proofs of the diligence and despatch of this great judge are transcribed by Mr. Cooper from authentic documents.¹ Sir Joseph Jekyll and Sir William Grant rank as almost equally great. The following is an account of the business done by Sir Joseph Jekyll whilst Master of the Rolls, during a period of ten years, from Michaelmas 1745 to Michaelmas 1755, and also of the business done by Sir William Grant as Master of the

¹ Returns to the House of Lords in 1811, on motion of Lord Lauderdale.

Rolls, during a like period of ten years, from Michaelmas 1800 to Michaelmas 1810:—

1745 to 1755.		1800 to 1810.	
<i>General Paper.</i>		<i>General Paper.</i>	
Decrees	1674	Decrees	2518
Further directions.....	168	Further directions.....	805
<i>By Consent.</i>		<i>By Consent.</i>	
Decrees	642	Decrees	1065
Further directions.....	187	Further directions.....	462
<i>Petitions.</i>		<i>Petitions.</i>	
General Paper	1932	General Paper	4798
Consent	509	Consent	2164
Rehearings	23	Rehearings	32

The supposed unimportance of suits a century ago, with the brevity and relevancy pervading the arguments of the ancient barrister, were erroneously thought to have enabled the Master of the Rolls of that day to decide a much larger amount of business in the same period than his successors. Both judges sat during the same days and hours; both sat occasionally for the Lord Chancellor. Sir William Grant, however, sat to hear appeals in the Privy Council, which Sir Joseph rarely did. The business submitted to Sir William Grant was as important as any that comes before the Court. From the despatch which he used, few of those causes were placed on his list which are instituted merely for delay, and disappear without discussion as soon as their turn to be heard arrives. Those figures, therefore, prove to demonstration his superior facility and promptitude to one of the greatest of his predecessors. That he also carried away the palm from his mighty chief, Lord Eldon, in the admirable attribute of prompt decision, a witness beyond suspicion, Sir Samuel Romilly, has borne unimpeachable testimony: "The Lord Chancellor has in the course of this Michaelmas term been prevented from attending the Court for above a week by ill health. His place was supplied as usual by the Master of the Rolls, who heard so many causes, and made such progress in the Chancellor's paper, that, after striking out many causes because the solicitors had not delivered briefs in them, he discontinued his sitting in order to give the parties in the remaining causes time to prepare themselves to have their causes heard. If, among the expedients

which have been thought of for clearing the present arrear of business, one should suggest that of the Chancellor staying away entirely from his Court, it would be considered as a jest. The truth however is, that this would be so effectual an expedient, that, if the Chancellor were only confined to his room by illness for two successive terms, there is no doubt that all the arrear of business, except the bankrupt and lunacy petitions, which the Master of the Rolls cannot hear, would be entirely got rid of. Application was made to-day to the Lord Chancellor to restore to the paper two causes which had been struck out when the Master of the Rolls sat for him, on the ground that they stood so low down the solicitors had no reason to suppose that they would be called on, and had omitted to deliver their briefs to counsel. The Chancellor refused the application."

"Obductâ solvatur fronte senectus :"—

Sir William Grant, on completing his sixty-third year, having presided for sixteen years over the Rolls' Court, became anxious to float down the stream of society without any public cares, and realizing a wish, long suppressed, to the surprise of many and regret of all, announced in Michaelmas Term, 1817, his determination to retire. He made the signal of retreat from office in the full vigour of his faculties and complete zenith of his fame, before any person, except himself, could have suspected that there was the slightest failure or decline, or even the appearance of decay. He set an example of retirement, which might have been gracefully imitated by several of his contemporaries.

"In the full vintage of his flowing honours

Sat still, and saw it pressed by other hands."

The scene of his actual resignation is given in the second volume of Merivale's Reports, and, though detailed before in this Magazine, reflects too much honour both on the bench and Chancery bar not to be transcribed again. Were it omitted, we should lose the most characteristic chapter of Sir William's life.

"On the 23d of December, 1817, Sir William Grant, having some time previously announced his intention of retiring from his office, sat at the Rolls for the last time, and

after he had delivered his judgment in the case of *Scott v. Porcher*, the only case heard before him which was then undecided, Sir Arthur Pigott rose, and, in the name of the bar, addressed his Honor as follows :—

“ ‘ Upon your retirement, Sir, from that seat of justice, in which for more than sixteen years you have presided, the gentlemen of the bar attending this Court are desirous of expressing the sentiments with which they are impressed on an occasion of great regret and concern to them, and on which they wish to offer an unfeigned tribute of that respect which you have so abundantly merited, and to which you are so justly entitled. The promptitude and wisdom of your decisions have been as highly conducive to the benefit of the suitor, as they have been eminently promotive of the general administration of equity. In the performance of your important and arduous duties, you have exhibited an uninterrupted equanimity, and displayed a temper never disturbed and a patience never wearied : you have evinced an uniform and impartial attention to those engaged in the discharge of their professional duties here, and who have had the opportunity, and enjoyed the advantage, of observing that conduct in the dispensation of justice, which has been conspicuously calculated to excite emulation, and to form an illustrious example for imitation.

“ ‘ Accept, Sir, the cordial and sincere wishes of those whom you leave devoted to the labours of this place, that with the gratifying reflections, that will be the inestimable reward of so considerable a portion of your life so meritoriously and exemplarily employed, you may enjoy health and happiness in repose, on your secession from business and labour, from the toils and anxieties of a painful judicial station, to the importance and eminence of which you have, in so great a degree, and in so distinguished a manner, contributed, and on which you have cast additional lustre.’

“ To which his Honor replied :¹—

“ ‘ It is impossible that I should not be highly gratified by

¹ We have been informed by an eye-witness that Sir Wm. Grant turned his head to the wall twice before he could articulate, and that he shed tears. He was not the only one who wept in the midst of a crowded court.

the favourable opinion which the gentlemen of the bar have been pleased to express of my conduct in the situation from which I am about to retire. For this and every other mark of their regard I thank them most sincerely. The kindness—the attention—the respect, which I have uniformly experienced from them, will never be obliterated from my memory. My conduct towards them has been only that to which their own merit justly entitled them. I have always found them alike distinguished for their learning and knowledge in their profession, and for the honour and liberality which they have carried into the practice of it. The approbation of such men is truly valuable; I receive it with pleasure, I shall remember it with gratitude. Gentlemen, farewell! my best wishes will ever attend you.”

“The foregoing address of the bar,” says an acute critic, “is sufficiently neat and germane to the occasion, more so, perhaps, than addresses on the retirement of eminent judges have usually been, but it gained nothing by the manner of its delivery. Sir Arthur Pigott read it from a paper with the same tone, emphasis, and apparent interest in the contents, which are wont to be exhibited by the officer at a trial at *nisi prius*, in reading a piece of documentary evidence, or by the clerk of the House of Commons, when he dispatches a petition. Sir Arthur Pigott was the father of the bar; he was considerably senior, both in years and standing, to the judge whom he addressed, and he might possibly have been unable to divest himself entirely of the feeling, that, but for the neglect of his own professional pretensions, or the ascendancy of the party to which he was politically opposed, he might himself have filled the situation from which he saw Sir William Grant retiring with dignity, at a comparatively early season of life. The apathy of the organ of the bar was contrasted by a burst of emotion which escaped from his Honor, in the course of a few graceful sentences which he uttered in reply.”

A saturnine observer and severe critic, not over addicted to praise, and differing from the judge in politics, writing in the calmness of the closet a month after the event, has thus recorded his estimate of Sir William Grant. “Sir William Grant has resigned the office of Master of the Rolls, to the extreme regret of all those who practised in

his Court, and to the great misfortune of the public. His eminent abilities as a judge, his impartiality, his courtesy to the bar, his dispatch, and the masterly style in which his judgments were pronounced, would at any time have entitled him to the highest praise ; but his mode of administering justice appeared to the greatest advantage by the contrast it afforded to the tardy and most unsatisfactory proceedings both of the Chancellor and Vice-Chancellor. Sir Thomas Plumer succeeds Grant at the Rolls. I had before intended to discontinue my attendance at the Rolls when the next session of parliament commenced, but if I had had no such previous intention, this change would have determined me. The number of causes entered of late years for hearing at the Rolls had been unusually great ; so great, that notwithstanding Grant's despatch, he has left an arrear of more than 500 causes. Causes were set down there with a twofold object ; that Sir William Grant might hear, and that Sir Thomas Plumer might not hear them. That Leach by his extraordinary presumption will involve himself in some ridiculous difficulties, is not at all improbable. He dined a few days ago in a company of fourteen persons, all of the profession, and some the intimate friends of Sir William Grant. In the course of conversation, it was said that that gentleman's leisure might have been very usefully employed, if he had been a member of the House of Lords, in assisting the Chancellor in the hearing of appeals in that house ; upon which Leach said to one of Grant's friends, ' If you will undertake that he will give that assistance to the Chancellor, I will undertake that he shall be made a peer.' This was repeated to me in the same words by three persons who were present at the dinner."¹

Whether the Regent's friend could have fulfilled his somewhat vainglorious boast was never put to the proof, for the ex-judge meant his retirement to be real, and was too unambitious to be cheated of the repose which he coveted, " in his reverence and his chair-days," by the gewgaws of a peerage, which he could not transmit. The coronet had been twice before within his grasp, and put aside. His mind was bent on rest, and to this he looked, though wealth and honours lay on

¹ Romilly's Diary, Jan. 1818.

each side his path, "*irretortis oculis.*" When a scheme was first agitated, in 1809, for increasing the salaries of the judges, George III., with whom he was a personal favourite, sent for the Master of the Rolls to ascertain what advance of stipend he might desire. The disinterested judge made an unlooked for and somewhat singular reply, that he did not want any, as he was perfectly satisfied with what he had. The good old king is said to have expressed, with much heartiness, his pleasure and surprise that he had found at least one satisfied man in his dominions. In consequence of this high-minded abstinence from solicitation, the salary of the Master of the Rolls was not increased, at the time of the general augmentation in the incomes of the judges. This parsimony, Mr. Robinson well remarked, when suggesting, as Chancellor of the Exchequer, a further increase in 1825, was extremely improper. As it arose from the great delicacy and disinterestedness of Sir William Grant, who, so far from applying for an increase, would not even state what the increase should be, he thought a very poor return had been made for so much delicacy. The stipend of his predecessors and his own fluctuated between 3500*l.* and 5000*l.* per annum, the judge being entitled upon every decree and dismission to the payment of 6*s.* 8*d.*, an objectionable perquisite, as it formed a tax on the administration of justice. At length, by the recent statute 7 Will. IV. & 1 Victoria, reciting that a new arrangement was most convenient and most consistent with the honour and dignity of the office, it has been enacted that all other sources of emolument should be abolished, and that the full annual sum of 7000*l.* should be paid to the Master of the Rolls out of the consolidated fund.

For five years after his retirement from the Rolls, the ex-judge continued to sit occasionally in the Cockpit and assist in the hearing of appeals, but withdrew gradually by almost imperceptible degrees from the fatigues of public life. He visited freely with the few families in the neighbourhood of Walthamstow, where he had pitched his tent—not a very distinguished, or brilliant, or learned society, but sufficient to satisfy his few wishes and unpretending tastes. His manners are represented as those of the old school, rather formal and elaborately courteous. He was taciturn though convivial;

not, according to Scottish phrase, an outspoken man. We read in Sir William Knighton's *Memoirs* an anecdote told by his brother baronet Sir Walter Scott, that Pitt and himself once decided, in order to make Grant talk, to remain quite silent, and only to pass the bottle quickly. This had the desired effect; their silence, with the assistance of the good old wine, made the judge talk freely. At the symposia which he sometimes shared with the premier, Dundas, the two Scotts and Sir J. Nicholl, the shy and haughty Pitt was, we are assured, the wittiest of the company. There could be found few parties at any table who drank their wine more freely, the statesmen and brother judges their old port, and Sir William Grant his madeira.

Graced with all that should accompany old age, the fourteen years that followed his retirement wore unperceived away, so placidly and so unmarked by any stirring incident, that his biographer is reminded of Dr. Johnson's ludicrous impatience, when inquiring from Hannah More her recollections of the latter days of Akenside. When the puzzled lady made an effort to recal some sayings of his, the matter-of-fact historian interrupted her with some asperity:—"Incident, child, incident, is what a biographer wants. Did he break his leg?"

Sir William Grant continued in the tranquil enjoyment of exercise, of literature, of society, with his faculties wholly unimpaired, and a healthy constitution, till his seventy-sixth year, when, for the advantage of a warmer climate, he withdrew to the pleasant watering-place of Dawlish, in Devonshire. There the enterprising Sir John Sinclair unearthed the ex-judge from his burrow by the present of his eccentric work on *Health and Longevity*, and by divers curious queries, which were thus courteously acknowledged:

"Dawlish, 27th February, 1830.

"My dear Sir,

"Allow me to thank you for your kind communication of the 8th inst., to which I might somewhat sooner have scrawled an answer, but am hardly now able to write one. My fingers have never perfectly recovered from the paralytic attack which I endured last autumn, and our unusually severe winter superinduced rheumatism in my arm, from which the present mild weather is only beginning to relieve me. The rules you have been so good as to send me appear to be very rational, though some of them are not applicable to

my situation. My business lies within a very narrow compass, and my reading has now no pretension to the name of study. Literary leisure is my portion, literary occupation is yours. Though I read a good deal, it is almost wholly for my own amusement. Your reading has the further and more important object of contributing to the instruction of others. I sincerely wish you health and strength to complete your useful labours. Though much gratified by your intended mention of my exertions on your election committee, I could wish it had not conveyed some reflection on my co-adjutor, though I do not at present recollect who he was. Believe me to be, my dear Sir John,

“ Very sincerely yours,

“ WILLIAM GRANT.”

The best specific for long life discovered by the indefatigable Scottish baronet was matrimony, and, that which does not always accompany it, eight hours' sound sleep at night. Sir William Grant presented in his own person a practical refutation of his first recipe for longevity, and remained a stout old bachelor to the last. We remember seeing him in London at the period of the first agitation for reform, a fine specimen of the old gentleman, tall and burly, bent somewhat with age, rather deaf, taking a lively interest in those political changes with which the times were rife, and indulging his nostrils with a long pinch at the expense of reform, and the modern reformer “ Jack Cade, the clothier, who meant to dress the commonwealth and turn it, and set a new nap upon it.” The old judge presented still a living likeness of those admirable portraits, one by Sir Thomas Lawrence, painted at the request of the barristers practising in the Rolls' Court, to be hung there as a perpetual heirloom, and the other by Harlowe for the Six Clerks' Office. There lingered in both the massive character—the predominant trait of thought and repose—a certain high-minded self-possession—the brooding of the majestic intellect over the noble, steadfast features,—the grave yet stately complacency of expression.

After a slow but painless decay, the breaking up of age, Sir William Grant died at Dawlish on Friday, 25th May, 1832, in his seventy-eighth year, leaving a small fortune, but leaving that inheritance which is pronounced by the wisest of the sons of men to be the best, a great and good name. A lawyer without the slightest greed of gain—a scholar perfect in

the science of jurisprudence—a judge peerless even in English courts of justice—a gentleman of Sidney's school “of high thoughts, bred in a heart of courtesy,” equal to Murray or Charles Yorke in the senate—not inferior to Hardwicke or Jekyll on the judgment-seat—he is gone, and has left great men behind him, but no successor. According to the mark of homage in his native land, a rude but simple offering of gratitude, we throw this stone upon his cairn.

T.

ART. IV.—CONSTRUCTION OF A POWER TO EXCHANGE IN A
WILL.

IN carrying into effect a proposed exchange between Sir Willoby Jackson and the trustees under his father's will of the Blanchland for the Hightown estate a difficulty arose.

The late Sir Willoby Jackson devised all his real estate, including the Hightown estate in question, to Charles Black and Robert Benson, their executors, administrators and assigns, for the term of 900 years, and subject thereto, to the intent that his wife Lady Jackson should have a yearly rent charge of 800*l.* during her life: and subject thereto, To the use of his said wife, his eldest son Willoby (the present baronet), and James French, esquire (the testator's brother-in-law), their executors, administrators and assigns, for the term of 1500 years, to be computed from his decease, Upon the trusts thereafter expressed: And subject to such term the testator devised all the hereditaments aforesaid to his said eldest son Willoby for life, with divers remainders over. And the testator directed that after every estate for life a remainder should be interposed to his executors and administrators during the life of tenant for life, to preserve the contingent remainders. The will contained a proviso that it should be lawful for his said wife and the said Willoby Jackson and James French, and the survivors and survivor of them and the heirs of such survivor, with the consent in writing of the person for the time being entitled as beneficial tenant for life in possession under the limitations thereinbefore contained, to sell the said hereditaments or to exchange the same or any

part thereof for or in lieu of other hereditaments of a good and indefeasible estate of inheritance in fee simple in possession situate in England. And the will also contained a proviso that in case any of the said trustees should die, or become unable or unwilling to act, then he empowered the surviving or continuing trustees of the same class or set of trustees, by any deed or writing, to appoint any person or persons in the room of such deceased, refusing or incompetent trustee or trustees. And the testator appointed his said wife, his said son Willoby, and the said James French, to be executors in trust of his said will, and they have all joined in proving the same.

Sir Willoby Jackson is seised in fee of the Blanchland estate, which was stated to be of much greater value than the Hightown estate, and is situate in the same county and comprises the mansion-house and seat of the family, so that a proposition which was made by Sir Willoby to exchange the same for the Hightown estate was a very advantageous one for the parties entitled under the will of the late baronet; but inasmuch as Sir Willoby is himself one of the three persons to whom the testator confided the power to sell and exchange the settled property, it was doubted whether the proposed exchange if carried into effect would operate to vest the Hightown estate in Sir Willoby free from the uses of the will, and as it was the intention of Sir Willoby after the exchange was made to sell the Hightown estate in lots, it was necessary that his title to it should be free from any doubt.

It was first thought that the above-mentioned difficulty might be got rid of by substituting another person in the place of Sir Willoby, under the power contained in the will to appoint new trustees; but upon observing carefully the language of the power of sale and exchange in the will, it may be doubted whether Lady Jackson, Sir Willoby, and Mr. French, can, as to such power, be deemed trustees, for the power is to them and the survivors and survivor of them, and the heirs of such survivor, and there is no prior limitation to them and their heirs in the will; so that it may perhaps be said that this power is a personal confidence in the three parties named therein, since they have no estate in the settled

property given to them jointly, the devolution of which the power might follow. If this opinion be correct, it seems to follow that the power in the will to appoint trustees does not apply to the donees of the power to sell and exchange. It will be observed that in the subsequent parts of the power, the *executors or administrators* of the survivor of the parties named are mentioned instead of heirs, so that probably the insertion of heirs was a mistake, and might be deemed so by any Court in construing the power, but a purchaser could not be expected to rely upon this without an actual decision.

There are several parts of the will which ought to be adverted to in considering this question. First, it may be observed that the testator makes the portions of his daughters to vest on their marrying with the consent of his said wife, his said son Willoby, and the said James French, or the survivors or survivor of them, which looks like a personal confidence; for afterwards in the same clause, when it is necessary to refer to them as the trustees of the term, the expression is "my said trustees." The testator empowers his said wife, and Willoby Jackson, and James French, and the survivor of them, and the heirs of such survivor, to cut and sell timber, and in the same power refers to them as his "said trustees or trustee." And the testator empowers the same three persons by name, and the survivors and survivor of them, and the heirs of such survivor, during the minority of any person beneficially entitled to grant, leases. The power to appoint new trustees concludes with the clause, That every trustee appointed shall be competent to the exercise of all the powers and discretions reposed in the trustees of the same class, but this could not be intended to pass any confidence or power vested in such trustees as individuals. Upon reviewing these clauses it may be observed, that if in the same will the same individuals are sometimes connected together as trustees, and referred to as trustees, and in other parts they are referred to by name, there is ground to doubt whether a personal confidence was not intended by the distinction, especially when the persons named are precisely those in whom it might be expected the testator would desire to repose such confidence. The reference to the heirs of the executors does

not remove this doubt, for it was necessary to provide against the contingency of all the persons named dying before the objects of the power were attained.

Upon the whole, however, it was thought, that Lady Jackson, Sir Willoby Jackson, and James French would, as to the power to sell and exchange, be deemed to be trustees within the intent and meaning of the power to appoint trustees ; but assuming this to be clear, and a new trustee were accordingly substituted in the place of Sir Willoby, a further question, it was suggested, would arise, whether the proposed exchange with Sir Willoby himself, immediately following such appointment, would be free from doubt. Assuming that the exchange could not be effected while Sir Willoby remained a trustee, it might be urged that he should not be allowed to accomplish his purpose indirectly, by withdrawing from a trust which the testator was desirous he should undertake. The consent of the cestui que trust, the usual pre-requisite on a trustee purchasing, could not in this case be had. It might be said that it was clearly the intention of the testator, by making his son one of the donees of the power to sell and exchange, there should be not merely his consent as tenant for life, but his judgment and discretion, for the benefit of the parties claiming under the ulterior limitations ; and it might be contended that the son, deriving a considerable benefit under the will, cannot renounce the trusts it imposes on him.

A discretionary power to direct the sale or exchange of settled property is a confidence or trust of a very delicate nature ; and though a Court of Equity will not control the discretion of the donee of such a power, yet it must view with great jealousy, and may certainly control, any exercise of the power in which the donee is personally interested ; and here the son may naturally be thought to be better acquainted with the value of the settled property than the other trustees. Can he, then, under such circumstances, by retiring from the trust, become the purchaser of part of the settled property, in which character all his judgment and knowledge must be said to be exerted for his own benefit ?

It is not doubted but that the proposed exchange would be highly advantageous to the parties claiming under the settle-

ment; but we cannot act upon such a fact, and must be guided by legal conclusions and principles. And it was thought better to state fully all the grounds of doubt which occurred, in order that they might be considered: And it was recommended that, before the proposed exchange were proceeded in, that the opinion of some eminent counsel conversant in real property law should be taken upon the points alluded to above; and to ascertain whether, under all the circumstances, the wish of the parties could in any way be safely effectuated so as to give Sir Willoby a clear and marketable title to the Hightown estate, so far as the same would be affected by the exchange.

In consequence of this, a very eminent conveyancer was requested to peruse the foregoing observations, and a copy of the will of the late Sir Willoby Jackson, and to consider the points raised on the powers of sale and exchange, and to appoint new trustees, contained in that will; and to give his opinion whether the exchange proposed by the present Sir Willoby, of the Blanchland estate for the Hightown estate, could be carried into effect, and by what means. And it was suggested that, supposing there was any difficulty in completing the arrangement by way of exchange, might not the trustees under the late Sir Willoby's will sell the Hightown estate under their power, and invest the proceeds in the purchase of the Blanchland estate? It was said that the present baronet, however, would much prefer the exchange, as it would save his co-trustees, Lady Jackson and Mr. French, the trouble of joining in the different sales of the Hightown estate. The following opinion was given:

“ I am of opinion that the proposed exchange by the trustees of the power of exchange in the will of the late Sir Willoby Jackson (including the present baronet as one of such trustees) of part of the devised lands for Blanchland estate, belonging to the present baronet, would be liable to be impeached under the rule of equity, that a trustee shall not be allowed to purchase of himself. I think that the principle upon which the case of *Howard v. Ducane*, Turn. & Russ. 81, was decided, will not extend to the present case. There the purchaser, who was tenant for life, was not one of the trustees for sale. When

it is clear that a trustee, in other cases, cannot purchase of himself, it would seem impossible to hold that the circumstance of his being also tenant for life should enable him to do so.

“The question then, is, whether the object can be effected by appointing a new trustee in the room of Sir Willoby Jackson.

“In my opinion, the power of changing trustees does extend to the trustees of the powers of sale and exchange. But assuming that to be the case, I think that an exchange afterwards made by the trustees with the trustee who had retired, might be objected to upon general principles. See *Ex parte James*, 8 Ves. 337, where Lord Eldon refers to the case of a solicitor discharging himself from that character, and afterwards buying the property.¹

“The trustees might sell the Hightown estate under their power; but there would be an objection to their investing the money in the purchase of the Blanchland estate. It would be open for the parties beneficially interested in remainder under the uses of the will to object at some future time to a purchase made by the trustees from one of themselves.

“This is a difficulty of the importance of which the trustees may themselves judge. Although it might involve them in liability, it would not give rise to any question of title, unless in the case of a subsequent sale or exchange of the Blanchland estate under the powers in the will. And I think it would be obviated by the appointment of a new trustee in the room of Sir Willoby Jackson.

“The exchange might be effected without difficulty by a private act of parliament.”

¹ See *Mackintosh v. Barber*, 1 Sug. Pow. 140, 141.

ART. V.—GIFTS PERFECT AND IMPERFECT.

THE administration of justice in civil matters is usually effected by a statement of facts to counsel, and by the acceptance of their opinion as a final decision. No wise man will encounter the delay and many troubles of litigation, if it is possible to agree upon facts and to obtain a decisive opinion upon the question at issue. There are, however, many questions which cannot be determined except by a court of justice. Some of them rest upon principles, which have not been satisfactorily ascertained; in others, the principles, although ascertained, cannot be safely applied to the circumstances.

It always appears to us that these subjects deserve peculiar attention and remark. In giving rise to a large amount of litigation, they are attended with an evil of no ordinary magnitude, which may perhaps be averted by a strict investigation into the circumstances of the case, or by a fair consideration of legal rules and principles. It often happens, too, that when rules and principles have been clearly laid down, they are little understood by the world in general, and that mistakes ensue which no power less than that of a court of justice is able to correct.

These remarks are particularly applicable to the subject which we have placed at the head of this paper. What constitutes a complete disposition of the property of one man in favour of another; whether such a disposition is beyond the possibility of recall; whether it will be cancelled and set aside by subsequent acts done for that or for any other purpose; these and kindred questions are constantly brought before our Courts, and appear to have caused an unusual number of errors, both amongst clients and legal practitioners. Moreover, when they are brought into Court, there appears to have prevailed the utmost delusion upon the mode in which Courts will grant or refuse assistance, and give effect to, or leave in a state of nullity, particular transactions.

The odd notions, which are prevalent, often come to light in the Courts of revising barristers. One man claims a vote for premises, which he alleges that his father gave to him, but he never had any writings; he has occupied them about

twelve years, and he believes that his father has no right to turn him out. Another man's vote is disputed, because his land was given to him by his father, although he produces his writings, and proves a beneficial enjoyment in his own person without payment of rent during a long series of years. A declaration of trust is sometimes produced, complete in all its parts, but is opposed as an imperfect transfer of property, because no consideration has been paid for it. But the doubts upon the subject are most frequently discussed, when the estate of a deceased person is to be administered, and questions arise whether particular pieces of property have or have not been given away by the deceased during his life. These questions have generally referred to choses in action, bonds, lottery-tickets, policies of insurance, government tallies, mortgages, government stock and annuities. Rather an amusing instance¹ of this kind of doubt arose as to the property of no less a person than the late Lord Stowell. He was in the habit of making frequent investments of stock, and he used to make them not in his own name, but in that of his son. His son died before him, and upon a full discussion before the present Master of the Rolls, it was decided that the stock belonged to the son, and not to the father. What was the particular object of the father in using his son's name rather than his own in the purchase, was not very clearly shown. Such purchases are, however, frequently made with a view to avoid legacy-duty. If this was the object of his lordship, the event, had his son died intestate, would have been, that the stock, which came from the father, would have returned to him, minus the legacy duty. At first it was supposed that the son did die intestate. Afterwards, however, his will was discovered, by which all the property was bequeathed to the sister.

In dealing with questions upon gifts perfect and imperfect, our present endeavour will be to ascertain the rules and principles, which have been established by statutes and decisions, and to show the mode in which those rules and principles have been applied to particular subjects.

As to personal goods, the law is, that they pass by de-

¹ Sidmouth v. Sidmouth, 2 Beav. 448.

livery,¹ or by deed.² If one man wishes to give to another a piece of coin, or a box, or a coat, he has only to put it into his hand, and the gift is complete. Delivery, however, is not indispensable. Goods are often in such a state and of such a nature that delivery is impossible. For instance, goods at sea. In *Brown v. Heathcote*,³ Lord Hardwicke says, "It has been insisted by the plaintiff's counsel, that this assignment is no legal bill of sale, or legal assignment of these goods. And it must be admitted, as to the homeward bound cargo, it is no legal assignment. But it has been carried still farther by the plaintiff's counsel, for they have likewise insisted the assignment does not amount to a bill of sale of the outward bound cargo, for want of a delivery of the goods themselves. I am of opinion that a delivery in this particular instance was not absolutely necessary to make it a complete contract; as in the case of a horse sold in a market overt, if the buyer pays the money for him, he may maintain an action against the seller, without showing a delivery of the horse." Lord Hardwicke excepts the homeward bound cargo. Of this exception the principle is more fully explained in the other case to which he referred, *Mair v. Glennie*.⁴ That principle appears to be, that the homeward bound cargo might have been taken into possession on the arrival of it at home, but that no such act was ever done. In *Mair v. Glennie* the persons claiming the goods had an opportunity of taking them into possession, but they refused to do so. And for this reason it was held, that the property had not passed. We may here observe that these were cases not of gift, but of assignments for value. Still the rules adopted in these cases are applicable to our present subject. They show how property of this kind may be transferred from one person to another. If made voluntarily, they will be good against the donor, but subject to such rights in other persons as will be presently mentioned. In inquiring how personal property passes by gift, the question is, how the gift may be complete against the donor. The rights of other persons involve considerations totally distinct.

It is easy to find other instances in which an actual delivery

¹ *Twyne's case*, 3 Co. 81 s. n. (c).

² *Shepherd's Touchstone*, p. 224.

³ *Brown v. Heathcote*, 1 Atk. 162.

⁴ *Mair v. Glennie*, 4 M. & S. 245.

of goods is unnecessary. In *Manton v. Moore*,¹ Lord Kenyon thus states the question, whether certain goods were in the possession of a canal company or of their engineer. "It has been properly admitted that if such a possession of the goods, as the nature of the case would permit, was taken by the canal company at the time when the bill of sale was executed, there is an end of the question. Then it becomes necessary to consider, what was the situation of these parties. The canal company, who were carrying on great works, had employed an engineer, and had advanced money to him, with which he had procured the goods in question, and deposited them on the banks of their canal, fit for the purpose of being there used; these materials were of great bulk; and this engineer, so being in arrear to the company, executed to them a bill of sale of these goods, then lying on the banks of their canal, which were their property. In cases of this kind, the question, whether the act be or be not fraudulent, depends on another question, whether the goods be or be not delivered with the instrument that professes to convey them. A conveyance of goods without deed is fraudulent, unless possession of the goods be given: if it be by deed, it is fraudulent, and an act of bankruptcy. But in this case no other possession could have been given. When the bill of sale was executed, the goods remained on the premises of the canal company, to whom the conveyance was made. It has been admitted in many cases, that there need not be a transmutation from hand to hand; where goods are in a warehouse, the delivery of the key of the warehouse has been held sufficient; and yet such a conveyance may be as secret as the present."

These cases leave undetermined how far delivery of goods is indispensable to the change of the right of property. We think that some more recent decisions have set this question at rest. In the first place, a delivery is unnecessary, if non-delivery is consistent with the terms of the deed by which an assignment purports to be made; as where the assignment is by way of pledge or mortgage. In the next place the change of possession is in no case necessary. "Possession is to be much regarded, but that is with a view to ascertain the good or bad faith of the transaction."² "The mere circumstance of

¹ *Manton v. Moore*, 7 T. R. 67.

² *Latimer v. Batson*, 4 B. & C. 654.

possession of chattels, however familiar it may be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown, under which that possession has followed. Every case from *Twyne's case* downwards supports that."¹ The rule which we deduce from the leading authorities is, that the assignment by deed and without delivery is a valid assignment. It may however be impugned by evidence of fraud, in which non-possession is a material circumstance. Of course the rule is applicable with peculiar force to gifts. Want of consideration begets suspicion; coupled with want of possession, it will leave to the voluntary donee a very difficult struggle in resisting any further evidence of fraud, which may happen to arise out of the circumstances of the case.²

Let us next take the cases of choses in action. In respect of our present subject they differ from personal goods in this important particular, that the donor does not intend to confine his gift to the instrument which he has in his hands, but that he intends to give the money to which that instrument contains evidence of title; the money due from the obligor upon the bond, as well as the bond itself; the insurance money, as well as the policy. The question therefore is not, what amounts to a gift of the paper or parchment constituting the title, but what is a gift of the sum, which, by virtue of that title, may be recovered.

If a person gives to another a paper which is in the nature of an order for money, it is not a complete gift of the money, for the power of ordering ceases with life. If then the donee dies before the order is presented, that power having passed from him to his executors, there ceases to be any authority upon which the persons to whom it is directed can be compelled, or can even venture, to make the payment. Lord Thurlow, in speaking of a gift of a cheque, makes the follow-

¹ *Arundel v. Phipps*, 10 Ves. 145.

² See *Steward v. Lambe*, 1 Brod. & Bing. 512; *Watkins v. Birch*, 4 Taun. 824; *Kidd v. Rawlinson*, 2 Bos. & Pul. 59; *Bull*, N. P. 258; *How v. Baker*, 9 East, 239; *Edwards v. Harben*, 2 T. R. 594; *Steel v. Brown*, 1 Taun. 381; and see particularly *Shep. Touch*. 224; *Martindale v. Booth*, 3 B. & Ad. 498. It is right to observe that many doubts are entertained, whether the transfer of chattels by deed, but without delivery, is consistent with the principles of the common law.

ing observations: "The case itself is purely a mistake on the part of the person meaning to give up, as well as the party receiving it; for if the note had been paid away for a valuable consideration and the money received at the bankers before notice of the death of the party, or immediately after, it might have availed; but for want of activity in the holders of it, it is become of no effect: one must allow one feels a disposition to make it effectual; but I must resist it, as it would be dangerous to decide the point under any particular bias."¹

In the time of Lord Hardwicke² an attempt was made, which, had it been successful, would have wrought an important change in the transfer of stock. The attempt was to construe a delivery of the receipt of stock effectual as a transfer of the stock itself. The claim was made by way of *donatio mortis causâ*; but the main point discussed by his lordship is, whether the stock had been actually transferred by the gift of the receipts. His lordship at once disputes the notion that delivery by a symbol is sufficient. The principle for which he contends is, that the delivery must be as complete as the nature of the case will permit; that where the delivery of a key is treated as a delivery of the bulky goods, upon which the key has been turned, the reason lies in the impossibility of moving the goods; but that there was no such excuse for accepting the delivery of a receipt for stock as a valid transfer of the stock itself, because a mode of transfer, to which all persons may have recourse, is provided by act of parliament.

We need not enlarge upon the various modes in which bank notes, promissory notes, bills of exchange, exchequer bills, and other negotiable securities pass from hand to hand. But with reference to securities of other kinds the difficulties are numerous. There is a great difference between such an act as will constitute a good *donatio mortis causâ*, and such an act as will be required as a *donatio inter vivos*. In the year 1774 Lord Hardwicke made a decision that *donatio mortis causâ* might be made of a bond by mere delivery. He afterwards alluded to this case in his judgment upon *Ward v.*

¹ *Tate v. Hibbert*, 4 Bro. C. C. 291.

² *Ward v. Turner*, 2 Ves. 443.

James, and supported his opinion in the following words:—
“ A bond was given in prospect of death ; the manner of gift was admitted ; the bond was delivered ; and I held it a good *donatio mortis causâ* ”—“ I am of opinion that decree was right and differs from this case ; for though it is true that a bond, which is specialty, is a chose in action, and its principal value consists in the thing in action, yet some property is conveyed by the delivery ; for the property is vested ; and to this degree that the law-books say the person to whom this specialty is given may cancel, burn, and destroy it ; the consequence of which is, that it puts it in his power to destroy the obligee’s power of bringing an action, because no one can bring an action on a bond without a *profert in curiam*. Another thing made it amount to a delivery, that the law allows it a locality ; and therefore a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another.” Thus, in respect of the doctrine of *donatio mortis causâ*, the gift of a bond is equivalent to a gift of the sum of money secured by the bond.

The case of *Duffield v. Elwes* led to a discussion, whether a mortgage could be the subject of *donatio mortis causâ*. The Vice Chancellor, Sir J. Leach, decided in the negative. The case was taken to the House of Lords, where it was argued at great length. A short statement of some of the circumstances will not be out of place. Mr. Elwes,¹ the donor, was entitled at the time of his death to sums of 2927*l.* and 30,000*l.* secured by bond and mortgage. On the morning of the day of his death, Mr. Hicks, a clergyman, proposed to him to make a gift *mortis causâ* to his daughter of these sums of money, and of the securities which he held for them. He assented and signed a formal memorandum of the gift in the presence of several witnesses. Mr. Hicks was afterwards informed that the gift was not completed by this act. He therefore procured the mortgage deed and bond, and, showing them to Mr. Elwes, explained to him the necessity of delivering them formally to his daughter. The mortgage deed and bond were then, in the presence and under the eye and observation of Mr. Elwes, handed across his bed to the daughter, and were received by her in her hands. “ As soon as she

¹ *Duffield v. Elwes*, 1 Bligh, N. S. 502.

had received them in her hands, Mr. Elwes took hold of her hands, while they contained the deed and bond, and with both his hands pressed together her hands, so holding the deed and bond, and showed evident marks of satisfaction." Now here, it will be observed, was a perfect delivery of the bond and mortgage deeds, as distinct and as clearly proved as any such delivery can be under almost any circumstances. That an erroneous decision should have been made by so good a lawyer as Sir John Leach upon such a state of circumstances, is no slight proof, that the rules of this branch of our law have been far from distinct. Lord Eldon, in giving judgment, treats the question as still unsettled, and arrives at his conclusion by applying to the case of a mortgage the same principles which Lord Hardwicke, in *Ward v. Turner*, had previously applied to the case of a bond. The argument upon the delivery of a bond derived from the necessity of proft in the action of debt, had, since the days of Lord Hardwicke, been taken away by the practice of bringing the action without making proft; but still it remained clear law, that the delivery of the bond as a *donatio mortis causâ* transferred the right of the bond-debt. Lord Eldon then observes,¹ "If the delivery of a bond would, as it is admitted, (notwithstanding any change in the doctrine about proft)—if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given: What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other, the judgment, which is to be considered on the same ground as a specialty, is delivered—with that the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back

¹ *Duffield v. Elwes*, 1 Bligh, N.S. 543.

again. Then the question is whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, these circumstances do not as effectually give the property in the debt, as if the debt was secured by a bond only? The opinion which I have formed is, that this is a good *donatio mortis causâ*, raising by operation of law a trust; a trust, which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a court of equity will execute."

With these cases we must contrast the case of *Edwards v. Jones*,¹ in which a question arose upon the alleged assignment of a bond, as a *donatio inter vivos*. The words of assignment were indorsed upon the bond, and were as complete as could easily be penned:—"I, M. C. of &c., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, E. E., of &c., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon: as witness my hand this 25th day of May, 1830." It was argued at the bar, that the bonds were delivered either by way of *donatio mortis causâ*, or as a gift *inter vivos*. Lord Cottenham shows that the transaction fails in many essential particulars as a *donatio mortis causâ*. He then proceeds to consider whether it can be good as a *donatio inter vivos*. There had been a delivery, and also the indorsement, already mentioned. "The transaction," says Lord Cottenham, "being inoperative for the purpose of transferring the bond as *mortis causâ*, which was a mere chose in action, the question comes to be, whether the mere handing over of the bond—supposing the record so to have stated the facts as to have entitled the plaintiff to make such a claim—whether such a transaction would constitute a good gift *inter vivos*, that is to say, whether the plaintiff would be entitled to the assistance of a court of equity, for the purpose of carrying into effect the intention of the parties. Now it is clear that this is a pure voluntary gift, and a gift which cannot be made effectual without the interposition of this Court." The assignment in

¹ *Edwards v. Jones*, 1 M. & C. 226.

this case did not contain a regular power of attorney to sue in the name of the donor: or, if the words contained in the assignment could be construed to be a good power of attorney, the power had not been used during the life of the donor. There was, therefore, a defect in the transaction; there was something further to be done by the parties; something more which the donee must obtain from the donor; or something which the donee must do for himself, before the donee could obtain the benefit, which beyond all doubt the donor intended to confer upon him.

Herein then lies the distinction between a gift *inter vivos*, and a gift *mortis causâ*. In the latter a power of attorney to sue would be useless to the donee, for the gift only takes effect on the donor's death, by which event the power to sue is at once extinguished. In the former the power to sue is the act, which completes the gift, which enables the donee to reduce the chose given into possession. Both classes of gifts are determined upon the same principle, that completeness is indispensable; but for the purpose of attaining completeness, the power to sue is a necessary ingredient in one case, but is not a necessary ingredient in the other.

In *Roberts v. Lloyd*,¹ a question was again raised upon a voluntary assignment of a bond to a person in trust. Lord Langdale decided that the assignment was complete; he stated, as his opinion, that the assignor had done every thing incumbent upon her to make the trust complete and valid, and decided the right of the parties upon that footing. On examination of the assignment it appears that it contained a power of attorney enabling the trustee to get in the debt. In *Fortescue v. Barnett*² the assignor had done all that was required of him for the purpose of effecting a valid transfer of the policy. The case was the more remarkable, as the assignment derived its validity not from any general rule of law, but from the nature of the contract of the insurance office. "The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties." Lord Cottenham appears to entertain doubts whether Sir John Leach, in deciding that case, applied the principle correctly; but as

¹ *Roberts v. Lloyd*, 2 Burr. 384.

² *Fortescue v. Barnett*, 3 M. & K. 36.

to the correctness of the principle upon which he proceeded he expresses no doubt at all. Sir J. Leach "put his decision expressly upon the fact that the transaction was complete; that there was nothing further for the donor or the donee to do, that the latter had nothing to ask further from the donor."¹

The difference then between the decisions upon these choses in action, when given *inter vivos*, or *mortis causâ*, is, that in the former instance there must be a power of attorney to sue, and the power must be put into force during the life of the donor. If we pursue the subject one step higher, we shall find that the same principle is applicable in each case, for that in each case the gift must be as complete as the donor can make it. Suppose that the dying donor was to give a power of attorney to sue, the power would become extinct with him, so that the donee on the only event upon which his title could arise, namely, the donor's death, would have no increased strength of title by reason of the power of attorney. Lord Eldon, in his judgment upon *Duffield v. Elwes*, alludes in the following manner to the nature of the incompleteness which, although it may attach to the gift, is still consistent with a *donatio mortis causâ*; he observes,² "that the title is not complete till the donor is actually dead, and that the question never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causâ* can call upon the representatives real or personal of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor in respect of personalty, the executor, and in respect of realty, the heir at law, are not bound to complete that which as far as the act of the donor is concerned in the question was incomplete; in other words, where it is the gift of a personal chattel, or the gift of a deed, which is the subject of the *donatio mortis causâ*, whether after the death of the individual, who made that gift, the executor is not to be considered a trustee for the donee, and whether, on the other hand, if it be a gift affecting the real interest, and I distinguish now between a security upon land and the land itself; whether, if it be a gift of such an interest

¹ *Edwards v. Jones*, 1 M. & C. 239.

² *Duffield v. Elwes*, 1 Bligh, N. S. 530.

in law, the heir at law of the testator is not by virtue of the operation of the trust which is created, not by indenture, but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causâ*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor."

The rule which makes a power of attorney indispensable to a good assignment of a chose in action may be brought to a test of a different description. It may be considered in analogy to a declaration of trust of personal property. The assignee, having received a power of attorney, sues at law, obtains judgment and execution, and a sum of money, not, however, in his own name; the money is to be paid to the plaintiff in the action, the assignor: if, however, he receives it, he will have in his possession a sum of money of which he has already made an assignment. The assignment operates as a declaration¹ of trust, and the assignor is in the position of one who has executed a declaration of trust, not of a chose in action, but of a sum actually in hand; in other words, he stands as self-constituted trustee for his assignee. If, however, the power of attorney had not been given, this relation would never have been created. The chose in action could not have been converted into a chose in possession; in other words, the assignor would not have completed all that was necessary to place himself in the position of trustee for his assignee. The assignee also has something to do on his own part: he must avail himself of the power to sue during the life of the donor. If he does not, the power is extinguished at the donor's death; the donor's executor cannot be compelled to give a power to sue in his name, and the assignment receives a character of incompleteness, for which the assignee has no means of providing a remedy. It may seem extraordinary that the gift, which was complete yesterday, during the life of the donor, should be rendered incomplete to-day by his death. It was complete; but only *sub modo*: that is, on the condition, that the donee availed himself of his reme-

¹ *Winch v. Keeley*, 1 T. R. 619.

dies under the power of attorney; just as the donee of a cheque may realize the gift during the donor's life by presenting the cheque, but finds the cheque a mere nullity after the donor's death. In this way there is a necessity, with a view to the completeness of the gifts, that the donee as well as donor should do all that is requisite to invest them with their full effect.

The question may perhaps be asked how, if this statement of the law is correct, an obligee of a bond can make such an assignment of the sum secured by it as may be conclusive under all circumstances. An answer may easily be given. The obligee can release his obligor from the existing bond, upon the obligor giving a fresh bond to the intended assignee. By these means the intention of gift will be completely carried out.

Our readers will bear in mind that the entire doctrine of assignments of choses in action is at variance with the rules of common law. Gradually a notice of such assignments and of the fiduciary capacity, filled by different persons, crept into practice. Parties had only to cross Westminster Hall, and they at once found protection for their equitable rights. It was thought unnecessary to subject them to this expense and inconvenience. Courts of law began to take notice of trusts, and to permit an assignee to sue in the name of an assignor. "It is certainly true,"¹ said Mr. Justice Ashurst, "that a chose in action cannot strictly be assigned: but this court will take notice of a trust, and consider who is beneficially interested, as in *Bottomley v. Brooke*, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor, in the same manner as if the action had been brought by her." Thus assignments of this nature have gradually been recognized in courts of common law.

With respect to the completeness of this assignment an objection has been raised, on the ground that the donor may at any time revoke the power of attorney, which he has thought proper to give. We venture to suggest a doubt whether he has a right to revoke a power of attorney given under these circumstances. The donee has in his possession both the assignment and the power of attorney signed by the

¹ *Winch v. Keeley*, 1 T. R. 623.

donor. This power then is coupled with the interest, which the donee has in the assignment. The question is, whether this is not such a power of attorney as the donor is incapable of revoking. Availing himself of his power, the donee brings his action. If the donor applies to the judge at common law, will the judge stop the action? Will he give any aid, beyond requiring security as to costs? If the donor institutes a suit in a court of equity, he must fail, as he is unable to allege any merits, upon which he can be allowed to undo his own act and deed. It seems to us that there can be no more reason for allowing a person to cancel a power of attorney given formally under these circumstances, than there is for allowing him to cancel a formal declaration of trust.

We now come to questions of gift, which refer to land. Formerly land was conveyed by feoffment and livery of seisin, of which ceremonies the former concerned the expression of the gift, the latter served as a publication to the world that the transfer of property had taken place. There can be no doubt that in those days the union of these two ceremonies, whether there was a writing or not, and whether a consideration did or did not pass, constituted a complete gift by the feoffor to the feoffee. Thus, until the time of the passing of the Statute of Frauds, many conveyances were made without any written memorandum.

It is needless to remark how many frauds were likely to arise out of this state of the law. The more complicated transactions became, the greater was the necessity to devise some system, by which the evidence of titles to land would be rendered safer and more distinct. Mr. Justice Blackstone¹ describes the introduction of writings in conveyances in the following terms, "Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides, the new occasions and necessities introduced by the advancement of commerce requires means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute desig-

¹ Black. Com. 313.

nations, for the purpose of raising money without an absolute sale of the land, and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere simple corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed; yet still for a very long series of years they were never made use of, but in company with the more ancient and notorious method of transfer by delivery of corporal possession."

The consequence of this further change in the law has been, that interests in land, except for a very short period, cannot pass from one person to another without a writing. The rule applies equally to all conveyances, whether with or without consideration. The statute, it will be observed, does not require a deed, although a deed is generally used; but unless there is a writing, there will be no valid change even of possession for any period exceeding three years. Thus, according to the existing law, if A. signs a writing, purporting to transfer certain parcels of land from himself to B., without any consideration, the transaction amounts to a gift.

The gift, however, being good in the first instance, may afterwards be rendered null and void under the statutes of Elizabeth against voluntary conveyances. But before we enter upon that subject we wish to offer a few observations upon a mode of gift, not unfrequently adopted, as to which a great deal of litigation has taken place—we mean declarations of trust without consideration. This subject applies to personal as well as to real property, and has been very frequently discussed, where the declaration has been imperfect, and courts of equity have been requested to supply the defect. It has been fully determined that the clearest intention to give is insufficient. Let the moral motives for the gift be ever so praiseworthy, let the covenant to give be ever so distinct, still, if the document containing the expression of intention, does not contain words by which that intention is carried into

effect, the courts of equity will not interfere.¹ As to personal property, the declaration need not be in writing. Parol is sufficient,² if the declaration of trust is fixed, definite and conclusive. Lord Eldon says, "I take this distinction to be, that if you want the assistance of the Court to constitute you cestui que trust, as upon a covenant to transfer stock, &c. if it rests in covenant, and is purely voluntary, this Court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this Court. That distinction was clearly taken in *Colman v. Sarel*, independent of the vicious consideration. I stated the objection that the deed was voluntary, and the Lord Chancellor went with me so far as to consider it a good objection to executing what remained in covenant. But if the actual transfer is made, that constitutes the relation between trustee and cestui que trust, though voluntary and without good or meritorious consideration, and it is clear in that case, that if the stock had been actually transferred, unless the transaction was affected by the turpitude of the consideration, the Court would have executed it against the trustee and the author of the trust." In truth these declarations of trust, if complete in themselves, are like orders for payment of money, assignments of beneficial interests, and other instruments by which parties entitled to property are allowed to dispose of that property for the advantage of others. In documents of this description, no one will doubt for a moment that they must be so complete as to take away every locus penitentiae; that the order must be peremptory, and the assignment clear and positive in all particulars. Yet, for the substance of the transaction, there ought to be no difference of construction, whether a person, by the document which he signs, orders A., who holds a sum of his money, to pay it to B., or actually assigns a sum of money, which he holds in his own hand, to B.; or, in the form of a declaration of trust, states that he A. will hold a sum of money on behalf of B.

The completeness of an order, like the completeness of a declaration of trust, has often been made the subject of suit.

¹ *Colman v. Sarel*, 3 Bro. C. C. 14.

² *Bayley v. Boulcott*, 4 Russ. 347.

For instance, in the case of the late Lord Hastings, reported under the name of *Watson v. Wellington*:¹ the solicitor of certain creditors, the executors of one Mr. Sims, applied to Lord Hastings for payment of a debt. His lordship then stated that he had directed Colonel Francis Doyle, whom he had empowered to receive his share of the prize money, to pay the debt and costs due to the creditors, and at the same time delivered to the solicitors the following letter, addressed to Colonel Doyle: "As I shall leave to you the distribution of the prize money, as soon as it shall be issued for me, I have to mention that the executors of Mr. Sims are claimants on that fund for a bond debt, with interest." Sir John Leach would not allow this letter to be a complete order or assignment. "The natural import of the words," he said, "is not a direction to Colonel Doyle to pay the debt, but an intimation, that the executors of Sims are claimants upon that fund, of which the marquis means to leave the distribution to the discretion of Colonel Doyle." He therefore dismissed the bill.

With respect to voluntary declarations of trust, it must be borne in mind that all the circumstances of each case, as it arises, must be taken into consideration. A casual observation, or a casual phrase in course of a correspondence, will not be sufficient to constitute a declaration, although the same expressions used in a more formal manner, and at a moment when the intention formally to declare a trust is clear and evident, would have been held satisfactory. Persons must not be caught by declarations of trust, as it is reported that persons on the other side of the Tweed are sometimes caught by declarations of matrimony. It must be proved to the Court, that the party declaring understands the nature of the step which he is taking, and that the expressions used are in themselves perfect and complete. Then the relation of trustee and cestui que trust having once been actually constituted, will be supported by the Court, and will receive full effect in a decree. The Court will not perfect that which is imperfect, or convert a writing executory into a writing executed. It will not take from the donor any remaining locus penitentiae. It will create no right. But where the right has been created, where the relation of trustee and cestui que trust has been

¹ *Watson v. Wellington*, 1 R. & M. 502.

actually formed, it will work out the benefits which are incident to that right, and spring from that relation.

It will here be proper to notice the distinction between the assignment of an equitable interest in a bond, and the assignment of the bond itself. In the first transaction the obligee intends merely to transfer a beneficial right in the sum of money. For this purpose his act is complete. There is nothing more to be done. There is no *locus penitentiae*. Before the assignment¹ was made, the duty of the trustee was to hold the fruits of the bond, when recovered, in trust for the assignee; after the assignment, it is his duty to hold them in trust for the assignee. But one who contemplates the assignment of the bond itself intends to assign the legal as well as the beneficial interest. To effect this double object, his deed of assignment is insufficient. He has not given a power of attorney to sue in his name. There remains a *locus penitentiae*. Here then the donee, as he cannot obtain the benefit intended for him, without further assistance from the donor, and cannot compel the donor to give that assistance without the intervention of the Court, is disappointed in his expectations, because the want of a consideration will make his bill demurrable. In each case the principle is the same, that the donee cannot have the benefit, unless the donor has himself carried out his intention; but in the one case he has intended to give both interests, the legal and beneficial, for which purpose his act is incomplete; in the other he has intended to give only the equitable interest, and his act is complete to this extent.

We will now shortly notice some of the leading cases in which these rules have been established.

In the case of *Wheatley v. Parr*,² a mother specially and in terms constituted herself a trustee for infant children, had an account at her bankers made out in her name as trustee, and took a promissory note for the sum in question, made to her as trustee. Lord Langdale said, "I am of opinion that she did constitute herself a trustee for the infant children, and that a trust was completely declared so as to give to the plaintiffs a title to the relief which they claim." In *Benbow v. Town-*

¹ *Collinson v. Patrick*, 2 Keen, 123.

² *Wheatley v. Parr*, 1 Keen, 538.

send,¹ a person lent a sum of money upon mortgage, and desired that his brother's name, instead of his own, might be inserted as mortgagee, declaring that the mortgage was to be for the benefit of his brother. This was held to be a complete declaration of trust for the brother. In *Ex parte Pye*, *Ex parte Dubost*,² a donor wrote a letter to his agent at Paris authorizing him to purchase in France an annuity for a married woman, and to draw on him for the purchase-money: the purchase was made, but in the name of the donor, who however wrote to the agent authorizing him to transfer the annuity. Lord Eldon held that the donor had committed to writing what seemed to him to be a sufficient declaration that he held this part of the estate in trust for the annuitant.

Our observations have been hitherto confined to the acts of the donor, and to the circumstances which occur at the time of the donation. We must now look to subsequent events. We will suppose the gift to be complete, as a gift *inter vivos*, and inquire under what circumstances the gift will afterwards retain or be deprived of its validity. The statute of 13 Eliz. c. 5, was passed "for the avoiding and abolishing of feigned, covenous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels,"—"which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and continued of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts," &c. By the 27th of Eliz. c. 4, it is enacted that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use and uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had and made "for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased or shall afterwards purchase in fee simple, fee tail, for life, lives, or years, the same lands, tenements, and hereditaments, or any part or

¹ *Benbow v. Townsend*, 1 M. & K. 506.

² *Ex parte Dubost*, *Ex parte Pye*, 12 Ves. 150. See *Colyear v. Countess of Mulgrave*, 2 Keen, 81; *Edwards v. Jones*, 1 M. & C. 230; *Roberts v. Lloyd*, 2 Beav. 381; *Collinson v. Patrick*, 2 Keen, 123.

parcel thereof, so formerly conveyed, &c. or any rent, profit, or commodity in or out of the same, or any part thereof, shall be deemed and taken only as against such persons, and their representatives, as should so purchase for money, or other good consideration, the same lands, tenements, or other hereditaments, or any rents, profits, or commodity in or out of the same, to be utterly void. But the act is not to extend to make void any conveyance, &c. to be made for good consideration, and *bonâ fide* to any person."

The object of the first of these statutes was to protect creditors; the protection is one, which embraces personal property as well as real property. The object of the second of the statutes is to protect purchasers; the protection includes only the landed property, which is the subject of purchase for pecuniary consideration. In each statute, fraudulent gifts and conveyances, and assurances previously made, are rendered null and void, for the benefit of these particular persons. The decision in *Gooch's case* gave very extensive operation to these statutes: for it went to this extent, that a person who bargains for a property, of which such a fraudulent conveyance has been made, with full notice, may set it aside; for, said Chief Justice Wray, "the act has by express words made the fraudulent conveyance void as to a purchaser; and, forasmuch as it is within the express purview of the act, it ought to be so taken and expounded in suppression¹ of fraud." But in order to see the full effect of the statute, we must look at this decision in conjunction with the decision in the case of *Doe d. Otley v. Manning*.² The question in that case is thus stated by Lord Ellenborough: "On this case, as it is found that there was no fraud in fact in the conveyance of, &c. the only point for the consideration of the Court is, whether a voluntary conveyance, without any valuable consideration, be not, according to the legal construction of the statute 27th Eliz. c. 4, fraudulent against a subsequent purchaser for a valuable consideration: or, in other words, whether in such case the law do not presume fraud, without permitting such presumption to be contradicted." His lordship then examines the authorities on either side, and certainly shows, that those

¹ *Gorch's case*, 5 Co. 60 b.

² *Doe d. Otley v. Manning*,

in favour of construing all such conveyances to be fraudulent, including the opinions of Lords King, Hardwicke, Thurlow and Kenyon, very much preponderate. He then adds, "as many estates depend upon the rule," (that is, a rule to that effect,) "it ought not, we conceive, to be shaken." Lord Ellenborough says not a word in approbation of the rule, but mentions it as one which cannot be shaken.

We have advanced then thus far; voluntary conveyances are fraudulent against purchasers for good consideration even with notice: voluntary gifts and conveyances are fraudulent against creditors, if the donor is in difficulties¹ at the time of the gift or conveyance. This is not a proper place for the examination of all the niceties which arise upon the questions, what are and what are not voluntary conveyances, or to how many persons, collaterals and others, a consideration will extend. "Any conveyance," says Sir Edward Sugden,² "executed by a husband in favour of his wife or children after marriage, which rests wholly on the moral duty of a husband or parent to provide for his wife and issue is voluntary and void against purchasers by force of the act." Upon this statement of the law, what a number of important and praiseworthy acts may at any time be rendered null and void by the operation of these statutes! Indeed, if the latter of them is to be strictly enforced, it is hard to discover, how any person, who has received land as a gift, can ever during the life of the donor regard it as definitively his own. It is always possible that his donee may get into difficulties. Then arises the temptation to sell the estate which has been previously given away: and it then becomes possible, that the donee may find himself deprived of that property, upon the continued enjoyment of which he has always calculated, merely because

¹ It does not seem to be distinctly determined what must be the extent of these difficulties, in order that the voluntary act may be void against creditors. Absolute insolvency, independently of the act itself, seems not to be necessary: but we submit it to be the correct rule, that, if the act itself, together with the claims previously existing against the donor, creates insolvency, it will then be treated as fraudulent. *Shears v. Rogers*, 3 B. & Ad. 362; *Norcutt v. Dodd*, 1 Cr. & Ph. 103; *Townsend v. Westacott*, 2 Beav. 340; *Lush v. Wilkinson*, 5 Ves. 384; *Richardson v. Smallwood*, Jac. 552; *Mathews v. Feaver*, 1 Cox, 278; *Rider v. Kidder*, 10 Ves. 360; *Walker v. Burrows*, 1 Atk. 93.

² Sugd. V. & P. 3, § 288.

a conveyance, valid during many years, is at last invested with a fraudulent character.

The consequence of the construction, which these statutes have received, comes fully into notice, when we turn to the cases of *Pulvertoft v. Pulvertoft*¹ and *Buckle v. Mitchell*.² In the former of those cases a father had, after marriage, made a settlement for the benefit of his family. The bill was filed by his wife in the person of a next friend. It charged that, at the time of the execution of the deed of settlement, he was in affluent circumstances, but that he was now about to sell the estate. It prayed the establishment of the voluntary settlement and an injunction to restrain the husband from completing the intended sale. An injunction was obtained *ex parte*, but dissolved upon the merits. "If," said Lord Eldon, "this is a voluntary settlement, I cannot grant the injunction." The decision in the case of *Buckle v. Mitchell* goes one step further. There a purchaser, with notice of a voluntary settlement, obtained a decree for specific performance of a contract for sale against the settlor. Indeed an attempt has been made to carry the doctrine even beyond this point. In *Smith v. Garland*,³ the settlor himself, in spite of his own previous settlement, filed a bill to compel an unwilling purchaser to fulfil an agreement for sale. To a suit of this nature, the Court would not accede. "A purchaser," said Sir William Grant, "has in equity the same rights as at law under the statute; and the voluntary settlement as against him cannot stand. But the party who made the settlement has no right to disturb it. As against himself it is valid and binding." "There is no party before the Court who is an object of the provisions of the statute. The vendor is not within the contemplation of the statute. The purchaser might claim the benefit of it; but he does not, he repudiates it. As between the settlor and the objects of the settlement, it is a perfectly binding settlement; and the plaintiff has no ground whatever for the relief which he prays."

We need hardly say, that in the propriety of this decision we entirely concur. To us it is a subject of regret that the law has been so construed as bring every voluntary convey-

¹ *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

² *Buckle v. Mitchell*, 18 Ves. 100.

³ *Smith v. Garland*, 2 Mer. 123.

ance within this statute. If we examine the words of it, we shall be perfectly astonished that a conveyance made by a man perfectly solvent, in favour of those persons for whom he is required by every social and moral tie, nay, by the laws of our country, to provide, is construed to be a fraudulent transaction ; moreover, that a Court of equity will interfere to carry into effect a second transaction, of which it is the necessary consequence to taint the former with a fraudulent character. Let the balance be struck between the two parties ; on the one hand, the family, the wife and children, the latter at any rate guiltless even of negligence ; on the other, the purchaser, who, with perfect knowledge of the rights created long previously, and remaining until the moment of his contract valid and indisputable, still makes his bargain, and wilfully and intentionally frustrates all the expectations, which have naturally arisen out of the previous transaction. Can there be a doubt which of these parties should be treated as the more meritorious ? Or rather, is it not clear that the family deserve protection, and that the purchaser is taking part in an act which every honest man will eschew and repudiate ? Yet equity aids the purchaser in bringing the family to distress, and perhaps to ruin.

If the case of *Buckle v. Mitchell* had not been decided, we should have thought that it was perfectly inconsistent with the principles of a Court of equity to grant a decree for specific performance in such a case. The granting of such a decree is matter entirely for the court's discretion. The plaintiff, who asks for it, must be a suitor with hands perfectly clean : and he must not ask the Court to compel the defendant to do an act which is unlawful. See then the situation of the parties. The plaintiff is aware of the relation already subsisting between the settlor and the objects of the settlement ; and he knows, when he makes his bargain, the exact nature of the act, which he is inducing the vendor to perform. Now that act has a double character. It consists partly of a conveyance, which the law holds good ; but partly also of the creation of a certain effect upon an act previously done, which has hitherto been valid and legal, but will now be rendered fraudulent and vicious. Equity will not compel a man to do an act fraudulent in itself. Surely in

consistency with this rule, it ought not to compel him to do an act, by which a transaction praiseworthy in itself, and hitherto unexceptionable in the eye of the law, will be tainted with fraud and become a nullity.

Upon the same principle we cannot but think, that an interference by injunction in such a case as that of *Pulvertoft v. Pulvertoft* would have been perfectly consistent with the rules of a court of equity. The parties were in a situation similar to that which we have been considering. The children were *cestuis que trust* of the property in question legally constituted. The proposed vendor was the trustee, self created. The proposed purchaser had made his contract with a perfect knowledge of the previous transaction. If the Court refused interference, the settlement became fraudulent by the act of the settlor, the family were defrauded, and the purchaser gained the benefit of a contract, which it was disgraceful for him to make. If on the other hand the Court interfered, it rescued the children perhaps from ruin, and deprived the vendor and purchaser of their respective gains in an unconscientious bargain. Yet the Court refused to interfere.

We make these remarks with the less scruple, as we are aware how frequently the doctrines on which we have commented have been the subject of regret. It is possible that in the first instance they crept in without sufficient consideration: they have been followed on the principle that a rule ascertained is better than no rule at all. "If," says Lord Ellenborough in concluding his judgment upon *Doe d. Otley v. Manning*, "the adhering to such determinations is likely to be attended with inconvenience, it is a matter fit to be remedied by the legislature, which is able to prevent the mischief in future, and to obviate all the inconvenient consequences which are likely to result from it as to purchases already made. And we cannot but say, as at present advised, and considering the construction put on the statute, that it would have been better if the statute had avoided conveyances only against purchasers for a valuable consideration, without notice of the prior conveyance."

If the laws had been established to this effect, all the evils which we have mentioned would have been avoided. Nor can we help expressing a hope that a series of decisions so incon-

sistent with morality and so detrimental to all classes of persons in the most intimate and delicate relations of life, may soon be deprived of authority by a statutory enactment. The train of evils is thus described by Sir W. Grant:—"Considering the party contracting for a purchase as in equity a purchaser, the statute, as construed, says that a settlement set up against him is merely a fraudulent device to cheat and impose upon subsequent purchasers. Is the Court to say that, because of that fraudulent device, it will refuse to act in favour of a purchaser who stands in need of its interposition? The statute, as it has been construed, says that a purchaser, who has notice of a voluntary settlement has notice not of a title but of a nullity and a fraud. How then can a Court of equity say that it is unconscientious in a person, having such notice, to enter into a treaty for a purchase, when it is bound to say that there is nothing unconscientious in his taking a conveyance of the estate?"¹ May it not be argued that at the time at which the purchaser received the notice, that is, before his purchase and even before his contract, the voluntary settlement was not a fraudulent device, but a valid and up to that moment a binding deed; and that the notice, which he received, was of a legal and proper transaction? It might be added that the Court may interfere to prevent a party from making that fraudulent which is now valid, when there is an opportunity of doing so, without disappointing the just expectations or shaking the vested interests of any one of the parties concerned. But these decisions are far too firmly established to be shaken by any argument in any case which may hereafter arise. We can only do our best in showing the iniquitous state of this branch of the law, and recommend it as a fit subject for legislative interference. In the mean time there is one partial remedy for the evil, which is within the authority of Courts of equity. When voluntary conveyances are set aside under the 27th of Elizabeth, the purchase money may be ordered to be paid not to the vendor, but to the person who took under the voluntary conveyance. All parties will then be placed in positions as consistent with their own acts and contracts, and as nearly corresponding with their just expectations, as the statute will permit according to

¹ *Buckle v. Mitchell*, 18 Ves. 111.

its present construction. The vendor will have neither the estate, nor the price of it. By his own acts he has parted with both; nor ought his position to be improved, because he has happened to find a purchaser for value. To the volunteer the price will be some compensation for the estate of which the law has dispossessed him.

In considering what conveyances come within the description of voluntary conveyances, we are reminded of a question upon which great discussion has taken place. It is thus stated by Sir Edward Sugden,¹ "whether the marriage consideration will extend to remainders to collateral relations, so as to support them against a subsequent sale to a bonâ fide purchaser." The opinions expressed in the early cases are by no means uniform. Indeed there seems to have been an inclination to support these remainders.² Numerous cases have occurred, in which the point has been considered, and yet, on account of certain peculiarities, has not received a direct decision. In some³ the collateral relation had some interest in the settled property, and in sacrificing this interest, he gave a good consideration; or he has paid a part of the sum, which the settlor has received; or the main point discussed in the case has been of a totally different nature. Lord Eldon suggested a very ingenious ground, upon which the support of such limitations might be founded. He⁴ says, that "in case of a father tenant for life, with remainder to his son in tail, they may agree upon the marriage of the son to settle not only upon his issue, but upon the brothers and uncles of that son; and that the question will then be, whether they, though not within the consideration of the marriage, are not within the contract between the father and son, both having a right to insist upon a provident provision for uncles, brothers, sisters, and other relations, and to say to each other, "I will not agree, unless you will so settle." He added, that provisions of this sort have been held to fall within the range of the consideration. Reasoning of this kind is however open to an objection, of which the validity has been repeatedly admitted, namely, that strangers to a deed cannot enforce the execution of it. Children of a marriage are not strangers, and are there-

¹ 3 Sug. V. & P. 289.

² Jenkins v. Keymis, 1 Lev. 150; 1 Ch. Ca. 105; 9 East, 69.

³ See cases collected in Sug. V. & P. ub. sup.

⁴ 18 Ves. 92.

fore allowed to enforce the settlement; but brothers and sisters, and all other relations are clearly strangers, and stand in the same relation to the settlor as creditors stand to a debtor, who has executed a deed to certain persons as trustees for payment of debts. Such creditors, as they are not parties to the deed, are not allowed to enforce it. Yet the trustee might have refused to accept the trust, or the debtor to create it, unless it were extended to the benefit of creditors of every description.

The principle, upon which voluntary conveyances are to be construed void, must be, either that there is no harm in taking from the donees property, for which they gave nothing; or else that the party conveying of necessity intended a fraud. Which-ever explanation is adopted, it seems to us to apply to collaterals in a marriage settlement. They have given nothing by way of consideration. They are not the fruit of the marriage. Why then are they to come within the provision which is made on account of the marriage? Such peculiar circumstances as those to which we have referred, may establish for them a substantial claim: but circumstances of this kind will not affect the general rule. Sir Edward Sugden seems to be by no means certain whether the point can be treated as one definitively settled. At any rate we think that there is little doubt as to the decision which will be made, if ever one is requisite; for in *Johnson v. Legard*,¹ Lord Eldon said, "That if there had been nothing more in the case than that the settlement was made upon the marriage, he thought that the remainders would have been held to be voluntary and void against a subsequent purchaser." We are the more desirous that this opinion may be supported, as it seems to us to be in perfect conformity with the views of unprofessional persons. Instances have come within our knowledge, in which the marriage of one member of a family has been regarded as a proper occasion for securing a provision for another. We cannot but think that the property to be settled should, so far as the settlement is concerned, be kept perfectly distinct for the benefit of the husband and wife, and of their issue; and that any other arrangement, which members of either family may require, should be made in a separate instrument, and avowedly upon different considerations.

¹ *Johnson v. Legard*, Turn. & Russ. 293.

ART. VI.—ON THE GOVERNMENT OF DEPENDENCIES.

An Essay on the Government of Dependencies. By George Cornwall Lewis, Esq. London. Murray. 1841.

THIS is an attempt to investigate analytically the principles of the political relations existing between a governing country and her dependencies, members of the same empire, according to the language now usually adopted. Athens was a governing country in this sense, when she enjoyed the *hēgemonia*, or partial sovereignty over a multitude of smaller Grecian states; Spain, in the period of her grandeur, when her monarchs ruled over portions of Italy and the Low Countries, as well as their vast transatlantic dominions; Venice, with her subjects on the mainland of Italy and in the Levant; and Great Britain affords the most remarkable modern instance, occupying the central and commanding place in the many-coloured empire of Queen Victoria.

There never probably was a time at which abstract political speculations of this description were less popular, or less regarded by statesmen, than the present. But they are not, therefore, the less useful. Very few, we suspect, have ever troubled themselves with the investigation of the general axioms which govern this province of political research. They are very seldom needed: it is quite enough, in ordinary times, to abide by the common and understood rules of everyday practice. But occasions every now and then arise, in which such practical knowledge is at fault, and those few who have devoted a few leisure hours to the investigation of remoter truths enjoy a singular advantage, were it only from the superior readiness in debate which they thus acquire. Such a conjuncture arose when Canadian politics became all at once the subject of national interest three or four years ago. Everybody knew that Canada was a dependency of the British empire, and had a legislature of its own: scarcely one in a hundred of those who argued the matter had taken the trouble to establish in his own mind the relative positions of Canada, Great Britain, and the empire, or to define for himself that ambiguous "sovereignty" which Great Britain claimed over Canada, and that equivocal "independence" which the Canadian Assembly asserted for itself. And the

very few who had done so appeared to us, to use a lawyer's illustration, to enjoy over the others the same superiority which belongs to a counsel arguing a point of law arising on a difficult question of facts which he has got up, over one who picks up both law and facts as he goes on in his argument out of the contents of his affidavits.

This is the service which the perusal of Mr. Lewis's book is calculated to render; by far the greater part of it consisting, as is usual with Mr. Lewis, of clear and well-argued expositions of principles not in themselves admitting of much question, or of much originality of view: principles which are, generally speaking, admitted at once as soon as they are brought to our notice: but which, nevertheless, are much better learnt when learnt, as Mr. Lewis teaches them, grammatically. There are few suggestions or statements of new and disputable positions of political expediency: nor do we for our own parts always agree with the author, when he assumes the unusual character of a political adviser; for, like most reasoners of an analytical turn on practical subjects, he is always more struck with the absurdity of an anomaly, or apparent departure from principles, than with the real difficulty of a rigid adherence to it. But this is a defect, if such it be, rather the more valuable for its rarity. For in this particular branch of politics so very little attempt has been made to construct a system of government on fixed rules, that nothing can be more uncertain or anomalous than the whole state of our colonial jurisprudence, both as regards the political rights of British dependencies, and, what is more within our province, the state of their civil law.

There is a certain amount of truth in the old saying, that the establishment of a colony is like the building of a house; any sort of rubbish will serve to fill up the foundations, and the finished edifice will look none the worse. For there is scarcely any operation in human affairs in which so large a margin must be left for the uncertain and the unforeseen. Physical and moral circumstances, which it is impossible to predict, must influence so largely the character of every new community, that institutions framed beforehand with an excess of care are almost certain to become inapplicable in their details. And the first condition of their prosperity is freedom.

We are not speaking of freedom in the common political sense; but liberty of action, of which free political institutions are only one element among many; freedom to speak, think, buy, sell, build, plough and reap, as nearly as possibly can be, without interference from all that ingenious variety of restrictions which encumber the fiscal and social legislation of older states. But the theory of this kind of liberty, simple as it may appear, is the very last which law-makers are apt to learn. All systems which the wit of individual man has devised for the management of society are certain to be encumbered with prohibitions and regulations for the attainment of some peculiar political end,—some end which may be worthless, or altogether imaginary; or which may, indeed, be lofty and true, but the fulfilment of which requires a peculiar temper and tone of mind pervading society itself: qualities which might grow up in centuries, but of which the rapid progress of modern colonial communities renders the development impossible. And thus history shows us, that all preconceived schemes for impressing a peculiar form and character on such communities, whether by daring philosophers or old-fashioned lawyers,—whether by the creation of Utopian systems, or the careful transplantation of old ones, have uniformly and absurdly failed. Either the institutions have stifled the prosperity of the colony, or the colony has quietly laid them aside as useless lumber. The philosopher Locke framed a constitution for Carolina, which was a curious combination of ancient Greek ideas with modern feudal and representative notions: in ten years' time it was found absolutely unbearable, and caciques, landgraves, and the rest of the motley aristocracy created by it, vied with the populace in their desire to get it abolished. Near a century afterwards, Lord Egmont conceived the grand idea of parcelling out Prince Edward's Island in knights' fees, honours, and baronies, to be held by military tenure, and under the obligation to construct castles, and furnish men at arms; he did not succeed in getting the consent of government to this speculation, but he did succeed in having the island sold in about sixty shares to non-resident proprietors, who were to people it on the most approved principles: and, from that day to this, Prince Edward's Island has been the scene of constant litigation and

discontent, the nominal owners being unable to get rent, the actual occupiers unable to establish sound titles to their land. The French succeeded in establishing the feudal jurisprudence of Normandy in Canada: they did so at the expense of dwarfing the growth of one of the finest colonies in the world, which became enveloped and strangled by the rapid progress of the free Anglo-American settlements around it. And, to turn from great examples to one where both the settlement and the mischief were on a small scale, nothing can be more instructive in its way than the failure of the recent experiment in South Australia.

And if we extend our glance over a still wider surface, it is curious to observe how uniformly the views of projectors in the foundations of colonies, whether enforced or not by absolute law, have failed of realization: how widely different the eventual fates of their establishments have been from those which they appear to have anticipated: how generally the first impulse given to a new community has proved to be in the wrong direction, and the young plant has struggled back, not always without danger to its growth, into that attitude which it was ultimately to present. When the English first colonized the West India islands, the object of the day was to establish a dense agricultural population of Europeans on their soil: and thousands on thousands perished in the unnatural attempt, before the necessity of a change of system was demonstrated, or rather before the natural change wrought itself out, the great slave-holding landowners "swallowing up" the small ones. And, conversely, wherever in the northern parts of America it has been attempted to parcel out the land in large estates, it has invariably fallen sooner or later into the possession of petty freeholders. Virginia was endowed with a splendid church establishment, and provided with royalist settlers, on purpose to form a counterpoise to the democratic plantations of the New Englanders: and when the war of independence broke out, the church in Virginia had long fallen to nothing, and the people were the most red-hot of revolutionists. New South Wales, in the imagination of its earlier governors, was destined to remain for ever a penal settlement, devoted to the management of convicts, and all their views and contrivances were framed on the supposition that this state of things

was to be permanent: to the serious disadvantage of a country into which free labourers now pour annually by tens of thousands, which is growing rapidly into one of the most important of our commercial possessions, and in which the convict element is becoming diluted into insignificance by the vast admixture of purer ingredients. Wherever we cast our eyes in the map of the world, every point which civilization has touched seems to speak its own history, either of mighty schemes crumbled into nothingness, or of the offspring of casual and unnoticed industry rising into magnificence. Contrast those foundations on which millions have been lavished, national hopes concentrated, which have been encouraged by all the ingenuity of commercial restrictions, which figure in statute books, pamphlets, debates, and the writings of political schemers, with those which are absolutely unknown except by their success,—with which the forethought of man seems to have had nothing to do. Contrast Sierra Leone with Penang or Sincapore, Swan River with Port Philip, the Cape Colony with those of Australia, the British West Indies with the Spanish, Washington with New York or New Orleans.

This is no subject of mere idle speculation, or text for a commentary on the vanity of human designs. It furnishes considerations of some weight in the decision of the greatest problem in colonial government: namely, the degree of independence to be enjoyed by colonists: how far they ought to be left to the uncontrolled exercise of self-government in their municipal affairs, or how far the authorities of the mother country ought to interfere with them.

We are speaking here of colonies in the strict sense of the word, and not of mere dependencies. Mr. Lewis, with his usual carefulness of definition, has laid down the distinction between them in his present work.

“A *colony* properly denotes a body of persons belonging to one country and political community, who having abandoned that country and community form a new and separate society, independent or dependent, in some district which is wholly or nearly uninhabited, or from which they expel the ancient inhabitants.

“It is essential to the idea of a colony, that the colonists should have only formed a part of the community which they have abandoned for their newly adopted country. If an entire political com-

munity changes its country for a time, and moves elsewhere, it does not found a colony: thus a roving tribe of Scythians or Tartars does not found a colony, when it settles in the temporary occupation of a new district. So the Athenians, during the Persian invasion of Athens, when they embarked in their ships and took refuge in Salamis, were not a colony. Nor would they have been a colony, even if they had permanently changed their place of abode, for when an entire nation changes its seats, and establishes itself permanently in another country, as the Franks in France, the Lombards in Italy, or the Vandals in Africa, it is not said to found a colony. It is likewise essential to the idea of a Colony, that the colonists should have belonged to a common country. A new community, formed of persons collected together from various states in manner in which the original body of the Roman citizens is reported to have been formed would not be a colony of any one of those states. So the city of Thurii, which was formed a few years before the Peloponnesian war, of settlers from all the principal states of Greece, was not a colony of any of those states.

“But in order that a community should be a colony of a certain country, it is not necessary that every member of the colony should have been derived from that country. It is sufficient for this purpose that the bulk of the colonists, or of the governing or free class in the colony should have been inhabitants of such country. Thus in many of the Greek colonies the Greek settlers found in the new territory a native population which they reduced to a servile condition, and the Roman colonies were little more than garrisons of Roman soldiers in conquered districts. In like manner the importation of African slaves into Virginia and Cuba did not prevent Virginia and Cuba from being respectively colonies of England and Spain. On the other hand a small body of settlers in a new country mixing with a larger body is merged in the larger body, and the new community which they jointly form is considered as a colony of the state whose inhabitants preponderate in it. Thus, in spite of the body of Prussian Protestants, who left their own country on religious grounds and settled in South Australia, South Australia is deemed to be an English colony.

“Furthermore, a colony may be established in a territory being either uninhabited or thinly inhabited, as has been the case with the English colonies in North America and Australia;—a colony may likewise be established in a territory of which the ancient inhabitants are either expelled or reduced to a state of slavery. Thus the Athenians established a colony in Melos during the Peloponnesian war, after having slain the adult males and enslaved the rest of the

native population. The foundation of a Roman colony was generally preceded by an ejection of the native occupiers and cultivators. The Spanish settlers of America likewise exterminated or enslaved a large part of the native population.

"It is moreover essential that the persons who have abandoned their native country should form a separate political community. Unless persons who abandon their native country form a separate political community they are not colonists. For example, the French Protestants, who fled from France after the revocation of the edict of Nantes, and took refuge in Germany and England, did not constitute colonies in those countries. The small body of English Puritans, who first sought in Holland an asylum against religious persecution, did not form a colony until they afterwards established themselves in New England as a distinct community. Such a community may be politically independent, or it may be dependent on the government of its mother country; but in order to be a colony, it must be a separate, and consequently a new community.

"A colony may be compared to a swarm of bees which issue from the parent hive in a separate body and form a new hive.

"Since a colony, though always a separate, may be either an independent or a dependent community, it is evident that a colony is not necessarily a dependency. It is manifest, on the other hand, that a dependency is not necessarily a colony of the dominant country, as indeed of any country."—p. 170.

Carefully as this definition is drawn up, we are not certain that it absolutely satisfies us. "The bulk of the governing class" in Hindostan is British; but Hindostan is certainly not a British colony in the ordinary sense. We are not sure whether the real criterion between a colony and a dependency is not to be found in the occupation of the *soil*. Wherever this is chiefly owned by resident proprietors from the mother country, we should be apt to term the community a colony.

Now with regard to *colonies*, the ancient British policy most undoubtedly was, that of independence carried even to the extreme point. Wherever a British colony was planted, there a representative assembly grew up as of itself, as a matter of common right, even though not specified in the charter, of which some curious instances are to be found in early American history. And the assembly thus constituted assumed, as of course, almost all the functions of ordinary political government, and many which we should deem far

beyond the competency of such a body; for in several English colonies the assembly elected several of the chief executive functionaries, and in one or two chose the governor himself. The mother country scarcely thought of interfering with their domestic arrangements at all; not so much from the prevalent political theories, as from the political habits of that age, which were utterly adverse to any such interference. The only exception was in regard to the commercial code. The navigation laws of the mother country were enforced on the colonies with a degree of rigorous strictness curiously contrasted with the entire negligence which prevailed as to all their other affairs. The principle of government appeared to be briefly this; to allow the colonists the fullest scope for the exercise of their own fancies in matters of internal government, to allow such unimportant affairs as church, justice, education, municipalities, war and peace with native tribes, to take care of themselves, and to be administered according to the "law of God," or the "Blue laws," or any other laws to which the settlers might choose to subject themselves; but not to suffer them to forge a single nail, or buy a single parcel of goods, or freight a single ship, without express leave and licence from the powers at home.

"Up to the time of the American war," says Mr. Lewis, "the colonies founded by Englishmen were generally placed under subordinate governments, resting upon a completely democratic basis; and England was contented to allow the popular body in the dependency to manage its internal affairs according to their own liking, provided that the dependency submitted to the restraints which England imposed upon its trade for the sake of promoting her own imagined interest. Consequently the relations between England and her American colonies up to the middle of the last century closely resembled, as far as the management of their internal affairs are concerned, the relation between a Greek mother country and its colony; but the restraints which England imposed upon the commerce of these colonies were copied from the Spanish system."—p. 160.

In short, if it were not for the navigation laws, the paradox of Bryan Edwards would have been really a pretty fair representation of the practice of our old colonial government, however little it might represent the theory of it, as stated by

crown lawyers. That ingenious writer appears to have entertained a notion that the constitution of Great Britain and her colonies was in the nature of a federal union, the British parliament and the several colonial legislatures being independent of each other, and only placed in common subjection to the same executive head. (See the note to Mr. Lewis's work, p. 351.)

Now it is an historical fact of great importance, and one which has by no means received the attention it deserves, that a very extensive change, in practice as well as theory, has taken place in more recent times in respect of the degree of independence allowed to colonies.

"Since the close of the American war," continues Mr. Lewis, "it has not been the policy of England to vest any portion of the legislative power of the subordinate government of a dependency in a body elected by the inhabitants. The only exception to this uniform course of policy is furnished by the Canadian provinces, whose subordinate government was partly vested in a house of assembly by an act passed in 1791."

There is a slight mistake here as to the facts, which is very unusual in so accurate a writer, and injurious, as it has the effect of an overstatement. The legislative assembly of New Brunswick dates from 1785, two years after the American war. That colony indeed was but a new government carved out of an old one (Nova Scotia), which had before a representative government; and this, therefore, may be said to be hardly an instance of a new constitution. The same may be said of Cape Breton, which was added to Nova Scotia a few years ago. But Newfoundland, the only crown colony left in North America, obtained an assembly in 1832. It appears therefore that all the British colonies in North America have had assemblies granted them before *or since* the American war. It was in the Australian colonies that the example, unknown to our ancestors, was first set, of settlements founded by Englishmen without free institutions. For this in the convict colonies there were abundantly good reasons. But in South Australia, where no convicts were admitted, the original charter of the colony provides that representative institutions shall be established as soon as the population amounts to 50,000; a period not far distant in the natural course of events.

But if Mr. Lewis had confined his statement to pointing out the fact, that the representative assemblies of our colonies are practically less independent than of old—that there is far more “interference on the part of the mother country with the ordinary management of their internal affairs”—he might have found abundant proof of his position. Let us look back for a moment at the avowed grounds (ostensible or real) of the quarrel of the discontented Canadian party with our government. They were grounded on the interference of that government with the disposal of waste lands by its grants to land companies—the reserves for the clergy—the invasions, as they were termed, of the system of feudal tenures—and, lastly, the want of “responsibility” in public functionaries. Any one acquainted with our early colonial history will have seen that such discontents, previous to the American war of independence, would have been next to impossible, for this simple reason, that every one of the matters referred to was left almost exclusively to the management of the colonists themselves. There was no jealous appropriation of land. Except in Virginia and one or two southern colonies, there was no church establishment at all, and in them it was of little importance. Old usages of descent (such as those of the Dutch in New York,) were not interfered with. Functionaries were very few indeed, and most of them not only responsible but elected.

Now—to come back to our original argument—although we do not pretend to decide between the old *laissez aller* system and the modern theory of implanting good institutions in colonies—it certainly does appear that no outlay of human ingenuity has hitherto been so fruitless and unrewarded as that which has been devoted to making codes, establishing principles, creating municipal systems, in dependencies. There is in the human mind a strong and instinctive hostility to being made the subject of experiments; even when made by the ablest lawgivers and with the best intentions: a fact of which we suppose that no one can be better aware than the late commissioners for revising the laws of Malta. But, which is a still more important cause of failure, it is impossible to exaggerate the amount of ignorance which is carried to the discussion of colonial questions—the utter and strange

recklessness in dealing with colonial interests of vast importance, which has characterized too many British statesmen since the principle of interference with their affairs began to be recognized.

Lord North was the first minister under whom that principle "fructified"—though the party then called the "Grenville" had more to do with its promulgation than he. By the famous "Canada Bill," in 1774, he proposed, among other things, to extend the provisions of that act to the whole region bounded southward by the Ohio, and westward by the Mississippi. The whole of that country was to be subject to French laws, feudal tenures, absolute government, and, what was then thought a more dangerous innovation than all, the establishment of the Roman Catholic religion in government pay. The debates on that celebrated bill have been recently published from the notes of Sir Henry Cavendish. The minister's reply to the first attack of this opposition on this part of the measure is highly characteristic.

"Upon my word, Sir, I do not see that this bill extends it (the Roman Catholic religion) farther than the ancient limits of Canada; but if it should do so, the country to which it is extended *is the habitation of bears and beavers.*"

This region, the habitation of bears and beavers, concerning which the sans-souci minister professed himself thus entirely ignorant whether it was within the ancient limits of Canada or no, now contains three millions and a half of inhabitants, of British descent, living under British municipal customs and enjoying the benefits of British civil law. All this they owe to the American revolution. Had it not been for that event, French Canadian usages would have been extended, and the Roman Catholic religion established, over the whole country now occupied by the American states of Ohio, Indiana, Illinois, Michigan, and the British province of Upper Canada.

It was the recklessness of Lord North, displayed in this as in a hundred other instances, which contributed more than any single cause to lose us an empire. But although we may have had few ministers as utterly unprincipled as he, and none of so disastrous a celebrity, yet the genus of statesmen, of which he is a type, has been common enough before and

since ; easy, good humoured, amusing, epicurean, and caring for little in life besides place, good society, and the avoidance of trouble. Now such ministers, who, at home, are often fortunate accidents, because their peculiar qualities rather tend to smooth down the asperities of our party quarrels, are peculiarly dangerous in the government of our vast and distant dependencies. They care not to acquire the knowledge necessary for their management. They have not firmness to resist the importunity of the host of inferior quacks who are ever anxious to try their various political nostrums on these *vilis corpora*. They are too fond of an "easy life" to have leisure or willingness to attend to the often exaggerated complaints and grievances of subjects so remote, so ill represented at home, and often so little understanding the ground of their own dissatisfaction. It is generally under such ministers that the sword is drawn between mother states and colonies.

Now Mr. Lewis observes, as it appears to us, with much good sense, on the peculiar inconveniences which result from the establishment of popular institutions, without the full right of self government : of representative bodies, organized as if for the purpose of legislation, and possessing the power of legislation to a very great extent, but yet subject to arbitrary interference at the will of the dominant country : of that sort of medley, in short, which seems to exist in several of our colonies, from the permanence of the forms of our old system of colonial independence, together with the more modern spirit of interference. The length, however, to which this article is extending in our hands, prevents us from extracting the passage to which we principally refer (p. 314).

Mr. Lewis next proposes a remedy for this state of things : and as this is the most original suggestion in his work, as well as the most important, we may be excused for delaying a little time over it, although our intention in beginning this paper was rather to point out some anomalies in the legal than in the constitutional system of our colonies. It strikes us, we confess, with all the effect of a paradox : at all events, it sounds like a bold novelty to English ears.

His proposal is this : That in colonies having legislative bodies of their own, as well as in what are strictly called "crown" colonies and have none, there should be a power of

legislation for the colony in the dominant country : to be exercised by the king in council, "whenever such legislation would be useful" for the colony (p. 316).

"There is a constant tendency from inevitable causes to a misconception of the character and powers of a subordinate government. The relation of a subordinate to a supreme government is a complicated relation, which the people, both of the dominant country and the dependency are likely to misunderstand, and the incorrect notions entertained by either party are likely to give rise to unfounded expectations, and to practical errors in their political conduct. It is the duty of the government of the dominant country to do every thing in its power to diffuse correct opinions, and to dispel errors respecting its political relations with the dependency, and still more to avoid creating an error on this subject ; since, in case of any collision between the dominant country and the dependency, which an error on the subject is likely to produce, the weaker party, that is the dependency, can scarcely fail to be the chief sufferer. Unless the dominant country should be prepared to concede virtual independence, it ought carefully to avoid encouraging the people of the dependency to advance pretensions, which nothing short of independence can satisfy. If a dominant country grants to a dependency popular institutions, and professes to allow it to exercise self-government, without being prepared to treat it as virtually independent, the dominant country by such conduct only mocks its dependency with the semblance of political institutions without their reality. It is no genuine concession to grant to a dependency the names and forms and machinery of popular institutions, unless the dominant country will permit those institutions to bear the meaning which they possess in an independent community ; nor do such apparent concessions produce any benefit to the dependency, but on the contrary, they sow the seeds of political dissension, and perhaps of insurrections and wars, which would not otherwise arise.

"In the next place, a dominant country ought not, by neglecting a dependency, to allow it to form habits of practical independence, unless it be prepared to follow this system to its legitimate consequences, and to recognize formally the independent government which has grown up through its sufferance.

"If a dependent colony be neglected during its youth by the dominant mother country, it enjoys the advantages of practical independence which that neglect implies, and being weak and small it is not tempted to assert its independence : it feels the need of protection by the mother country, and does not as yet think of

entire separation. When it has grown older and stronger, its wealth naturally suggests to the mother country the policy of requiring it to contribute to the expenses of the general government. But if it has been neglected up to that time by the mother country, it will probably proceed to assert its independence, and the mother country must either resort to coercive measures or yield to its pretensions. The history of the Anglo American colonies makes it probable, that a mother country will neglect a colony while it is weak and needs assistance, and will attempt to tax it when it has become strong, and is likely to resist.

"The neglect of a dependency by the dominant country, is a snare and a deceit to the people of the former ; it lures them on to its destruction, unless the dominant country should be prepared to grant them the independence which they will infallibly seek to obtain.

"It will appear from preceding parts of this Essay, that the occasions upon which the supreme government can legislate directly for a dependency, to the advantage of the latter, are not numerous. There are, however, cases in which such legislation is expedient. In every such case the supreme government ought to legislate for the dependency, not merely on account of the utility resulting from the particular act of legislation, but also in order to remind the dependency of its dependence, and to avoid the neglect of the dependency, with the mischievous consequences which that neglect involves.

"But, for the purpose of accomplishing this object, all formal obstacles in the dominant country to such legislation ought, as far as possible, to be removed.

"It often happens that the supreme government, owing to its form being popular, or to the multiplicity of the demands upon its attention, is unable to legislate directly for a dependency, except upon extraordinary occasions. In this state of things it is expedient that the legislation for the dependency which proceeds from the dominant country should be conducted by some subordinate authority in it. But the subordinate authority best fitted for this purpose is that part of the subordinate government of the dependency which is placed in the dominant country. The legislation by such a subordinate authority, and the legislation of the supreme government itself, would, it is manifest, equally emanate from authorities representing the opinions and interests of the dominant country.

"In applying this remark to the English dependencies, we find that the crown, which forms that part of the subordinate government of a dependency which is placed in the dominant country, can

legislate by orders in council, or by instructions through the secretary of state, for a crown colony; but that the crown cannot legislate for a dependency, in which the local government is partly composed of a house of assembly, or other body co-ordinate with itself.

“The rule which prevents the English crown from legislating for a dependency, in which the form of the local subordinate government is popular, does not lead to inconvenient consequences, provided that the dependency be allowed to manage its own internal affairs, and to enjoy a virtual independence. But the application of this rule to dependencies, to which England does not intend to allow a virtual independence, is inconvenient, since it is impossible for parliament to legislate frequently for a single dependency; and therefore, when a necessity arises for the legislative interposition of the dominant country, it is likely that the interposition would come at too late a period, or will be made otherwise under unfavourable circumstances. Accordingly in a dependency belonging to the latter class, it seems expedient that the house of assembly should be considered mainly as a check upon the legislative powers of the governor and his council; and that the crown should possess a power of legislating for such a dependency in the same manner as it legislates for a crown colony.”—p. 316.

We doubt, for our own parts, the possibility of maintaining this species of semi-liberal government. We doubt the practicable character of *any* political system half-way between arbitrary government and freedom. Its chances of duration seem to be at best precarious, even where it has grown naturally out of circumstances, and rests for its foundation on old and recognized principles: as may be said to be the case with one or two constitutional states of central Europe, which possess legislative assemblies with very limited legislative powers. Even there it is evident enough that they are preserved at present only by reason of the weakness of the states themselves, and the compulsory act enforced by the mighty police officers of Europe, the Great Powers. Left to themselves, it is impossible not to anticipate one of two results—either the “estates” must bring the monarch to terms, or the crown must practically submit to the “estates.” The real difficulty in government is, where to place the power of the purse. This Mr. Lewis, in his scheme, appears to admit. If it is to be left to the representative assembly, then, call it by what name

we will, and make it as subordinate in theory as we please, it will be omnipotent before its first session is out. Deprive it of that power, and it is difficult to say of what real use such an assembly is, or why it should be convoked at all. Some term an assembly, thus emasculated, a kind of safety-valve for popular discontent: it is just as likely to blow up the whole machine of government as to preserve it. Every one knows the history of the French notables, and of the famous caricature against M. Calonne. He is represented as a cook, addressing an assembly of barn-door fowls.

“ ‘*Mes chers administrés, on vous a réunis pour savoir avec quelle sauce vous voulez être mangés.*’

“ ‘*Mais nous ne voulons pas être mangés!*’

“ ‘*Vous vous écarterez de la question.*’ ”

Now that such a government as this might be maintained in Canada or New Brunswick by force, we do not deny: but the problem is, to invent institutions by which our dependent nations may be governed peaceably without force. If we cannot have the old English system, under which the assemblies in the colonies were practically as well as nominally almost independent—legislating for all their internal affairs, voting their own supplies, and paying their own very slender civil expenses—we prefer to the scheme of Mr. Lewis even the present anomalous course of expedients, under which we contrive to jog on in our colonial administration from year to year; admitting the powers claimed by the colonial assemblies in theory, and striving to elude those awkward consequences, which Mr. Lewis has very justly pointed out, by all manner of temporary contrivances; alternately coaxing and bullying the said assemblies, and ever and anon taxing ourselves to make up the deficiencies in their votes. A definite constitutional system may emerge at last from these conflicting elements, as it did out of the Tudor anarchy in England; whereas the plausible scheme of Mr. Lewis could only establish a transitory order, which must end, as it appears to us, either in despotism or separation.

But these political reveries have carried us away from our own more appropriate subjects of discussion. Our object was to point out, through the medium of Mr. Lewis's book, one

or two remarkable principles, with their anomalous consequences, which prevail in the legal system of our colonies. For here, as in so many other points of our vast political and social system, the ultimate conclusion at which we arrive is mere uncertainty. There are distinct axioms laid down to guide us; but when we reach the results to which those axioms legitimately lead, we shall find them unrecognized by jurists, and certain exceptional doctrines set up in their place, for which it is difficult to discover any adequate foundation.

All who are conversant with our jurisprudence know that the same is the case in respect of almost all those apices juris, the consideration of which occupies so large a space in the works of our old legal writers, and furnishes so great scope to their imagination. Take, for instance, such maxims as that the king can do no wrong, or the omnipotence of the parliament, or, in later times, the supremacy of the people; or, in purely civil matters, the principle that there is no wrong without a remedy, that no one can be judge in his own cause, and so forth. Those who are acquainted with the speculations of Coke, and such writers, on some of these, and Blackstone, Bentham, Austin, &c. on others, are well aware that there is uniformly a point at which English legal logic stops short, and endeavours to turn round and face the opposite way, as if afraid of the extremes to which strict analysis is conducting it. So long as it is within the limits of what is strictly practical, it is close and satisfactory enough, and becomes more clearly so the more it is studied. The moment it gets beyond that domain, nothing can be more weak, inconclusive, and sometimes irrational.

Were it worth while, we think it would be possible to point out some of the causes of this peculiarity lying deep in the mind and habits of Englishmen. The English are essentially a practical people; and in nothing do their practical habits of mind appear more strongly than in their want of confidence in codes of law, elements of jurisprudence, declarations of rights, and so forth, in which everything is rendered clear, definite and unanswerable, and which, consequently, if their doctrines were earnestly carried out, would in general render civil society impossible. This is a main reason why complete systems—such, for instance, as those of the utilitarians—

have had so little sway in England. And the effects are peculiarly discernible in the history of the nation. Englishmen have that peculiar quality, which we would rather call rough good sense than discretion—an often indistinct and blundering perception, but still an instinctive one, of false and dangerous positions, which constantly saves them harmless, in situations when more imaginative and more logical people than they would run themselves into ruinous difficulties. Take, for instance, a Scotchman, with whom pure logic becomes a passion, and set him astride on the rights of the Kirk—in old times, on the rights of the Pretender—and he will ride, as the phrase is, to the devil. So with a clever and brilliant Frenchman, à cheval on his principles of equality or of national glory—à multo fortiori with an Hibernian, whether his colours be orange or green. Not so the Englishman. Let his hobby be never so dear, and “the pace” never so tempting, yet when he comes to a serious obstruction he is quite certain to “crane,” and most likely to pull up, in an attitude neither logical nor dignified, but, generally speaking, safe.

So it has been with English Jacobites, Jacobins, Roundheads, Puritans, Churchmen and Nonconformists, from time immemorial: and so it will be with Puseyites, Benthamites, and all except the very extreme partisans of every side, who form in England not parties but sects or coteries. A farther exemplification of what we mean will occur to those who may have perused the works of English writers of extreme parties—for instance, those of Mr. Gladstone on the relations of the Church and State—in which principles of the most iron sternness, which, if properly developed, would comprehend and crush to powder all the existing institutions of the world, are coupled with conclusions of the most yielding kind. Contrast them with such terrible consistency as that of Dr. Chalmers or M. de Lamennais.

The following are the two main principles, in regard to the civil law of colonies, which have led us into this digression:

First, that in regard to dependencies acquired by conquest, “the laws of the mother country, as they existed at the time of the transfer of the colony, are in force in such colony, without any of the alterations which may have been made subsequently to the transfer.”—p. 205.

Secondly, that in colonies discovered and planted by British subjects, the common law of England prevails, together with so much of the statute law as existed at the period of their foundation.

These principles are, in themselves, sufficiently simple and intelligible. But a sense of necessity in some cases, of convenience in others, and some very vague and general ideas of jurisprudence in several more, have introduced extensive deviations from them, out of which all the anomalies and uncertainties of the actual system arise: anomalies, in some cases, regarding only those extreme questions which are seldom practically brought in issue, and are safely left to the idle discussion of jurists; but, in others, affecting ordinary rights, and producing a very troublesome amount of unnecessary litigation. The principal of these are briefly and well sketched in Mr. Lewis's work; who has, however, not rendered this part of it so complete as he might have done with no material increase of trouble, by consulting some recent authorities of importance; the principal of which we will point out.

1. The rule, that dependencies acquired by conquest retain their own former laws, is liable, according to practical authorities, to *three* exceptions. The first is, in respect of those laws which concern allegiance to the sovereign power: "Admitting the general position, that, upon the conquest of a colony, the law remains unchanged until the will of the conqueror is expressed, I apprehend this must be taken as between subject and subject, not as between the sovereign and subjects: and that, consequently, be the government of the conquered colony what it may, the prerogative law is necessarily introduced to an extent sufficient to establish and preserve allegiance between the conqueror and the conquered."—(Sir J. Campbell's argument in *The Mayor of Lyons v. The East India Company*, 1 Moore, 258.)

The best instance we can give is that of the laws respecting aliens. Of course, on the conquest of a dependency, the status of individuals is changed, or rather reversed: an Englishman ceased to be an alien in the Mauritius, and a Frenchman became one, as soon as ever its conquest was effected. But, by a curious, although perfectly consistent, result from the principles which govern the subject, it has been held that,

although the law of England fixes the *status* of individuals in a conquered dependency, the law of the dependency itself annexes the incidents peculiar to the status : and thus an alien in the Mauritius can acquire landed property, because such was the law of France at the period of the conquest of that island.—(*Donegani v. Donegani*, 3 Knapp. 85.¹)

The *second* of these exceptions is said to be “the cessation of laws, in a conquered pagan country, which are inconsistent with the law of God;” or, in language more usual with jurists, “*mala in se*.” The first attempt to lay down this rule, as Mr. Lewis observes, is in Lord Coke’s report of Calvin’s case, which involved the question as to the status of the Scotch *postnati*. Of course the expression of any opinion on the subject in that case was altogether extra-judicial. The next attempt is a statement by the Master of the Rolls of some principles laid down by the Privy Council, upon an appeal from the plantations in 1722. According to that statement, the council decided that, “until laws are given by the conquering prince, the laws and customs of the conquered country shall hold place, unless where these are contrary to our religion, or enact anything which is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.”—(2 P. Wms. 76.)

It need not be said, that such maxims are of the vaguest possible description. To decide what is, or is not, contrary to the moral law of Christianity, or “*malum in se*,” in the laws and practices of the thousand strange tribes which own our supremacy, seems to require the faculties at once of a Socrates and an Augustine in their lordships of the Privy Council. And the doctrine itself, says Mr. Lewis, is treated as obsolete by Lord Mansfield in *Campbell v. Hall*, and also by Mr. Justice Gould in his summing up in *Fabrigas v. Mostyn*, 20 Howell, 162. This we doubt. Mr. Clark, in the preface to his work on Colonial Law, seems to think the well-known practice of

¹ This point appears, however, to be by no means free from confusion. According to the judgment of the Privy Council in *The Mayor of Lyons v. The West India Company*, the British alien laws are *not* a part of our prerogative law necessarily carried with us into dependencies : and a Frenchman, in Calcutta, is not an alien so as to be incapable of acquiring and transmitting real property, although various other portions of our law of property are in force there.

"Suttee," so long tolerated in India, and the strange abuses of the "Juggernaut" idolatry still allowed there, plain evidences that its application has been altogether set aside in British India. But the truth is, that the more remarkable of these violations of moral right were legalized by act of parliament; which seems to show that, in the opinion of the legislature, they would not have been legal without. The act is the 37 Geo. 3, c. 142, s. 12: "And in order that due regard may be had to the civil and religious usages of the natives, be it enacted, that the rights and authorities of fathers of families, and masters of families, according as the same may be exercised by the Gentoo or Mahomedan law, shall be preserved to them within their families respectively, nor shall the same be violated or interrupted by any of the proceedings of the said Courts; nor shall any act done in consequence of the rule or law of Cast, so far as respects the members of the same family only, be deemed a crime, although the same may not be justifiable by the laws of England."

More than this: we doubt the expediency of regarding this exception as obsolete, however strict theorists in jurisprudence may condemn it. There must be some control over the sanguinary or repulsive usages of savage tribes or demoralized nations; and that control must be founded on legal principle, otherwise it will be tyranny. Can any one doubt, that a British officer would be justified in preventing infanticide in Chusan? and yet it is certain, that if the rule laid down in Calvin's case is obsolete, he would be liable to damages for thus interfering with the right of a Chinese to do what he will with his own.

In Captain Grey's Travels in Australia there are some remarkable suggestions with respect to the government of the savages of that country; one of which is, that many of their usages of private revenge, violent treatment of wives by husbands, and so forth, should be suppressed at once, instead of being tolerated as they have hitherto been, as inconsistent with the law of England. How far this principle may be wisely or safely adopted in this particular instance we do not know; but the justice of the experiment rests entirely on that of Lord Coke's "rule;" for assuredly no one can say that there is any difference in the nature of things which should

make us more tender of the unchristian customs of semi-civilized people, such as the Hindoos or Chinese, than of those of the totally uncivilized.

Nor is it any answer to say, as Mr. Lewis appears to say, that such usages ought to be at once abolished by the conquering country, and that it is therefore better that they should remain legal during the interval, than that so vague an exception should be sanctioned. As Lord Stowell observes, in a judgment on which we shall comment presently, the conqueror must become acquainted with the laws of the conquered before he presumes to abolish them. Some time must be allowed for this process; more, to allow him to weigh properly how much should be abolished and how much retained. And the vague license left to the judges by this exception would be a far less evil than too hasty a proceeding in matters of such vital importance.

The *third* exception to the rule in question is "the cessation of laws which contain any thing contrary to the *fundamental principles of the British constitution*."

Here we have indeed a rule of the loosest description, and one of which the application by arbitrary or even by *crotchetty* judges might often be attended with the grossest injustice and oppression. The "fundamental principles of the British constitution" are something far less defined than even the "laws of God and nature." Yet it is remarkable, whether we ascribe it to caution or pedantry, how reluctant the interpreters of our laws have been, even when pressed by the closest logic, to abandon this shadowy maxim, although it is perfectly true that they have been far too practically wise to allow its enforcement to work as much evil as it easily might. In *Mostyn v. Fabrigas*, Lord C. J. de Grey incidentally dropped the assertion, as an *à fortiori* argument on the question then in discussion, that a British governor could not legally inflict torture in a dependency under Spanish law which recognizes torture. It was probably chiefly on the strength of this dictum that the famous case of *Rex v. Picton* was brought into court, in which all the reasoning of which the subject admits, it may almost be said, will be found collected. It must be observed, that Sir T. Picton was found guilty, on the finding of the jury that he was not authorized

in inflicting torture by the law of Trinidad at the time of the cession. A new trial was obtained on the ground of fresh evidence on this head; and a special verdict, containing the facts of the case, was agreed to, in order to raise the question, whether such a law, of which the existence was considered proved, could remain in force in a British dependency. The main argument urged against the defendant was this; namely, that torture was contrary to the principles of the British constitution; for although counsel in argument did throw out another objection, viz. that torture was *malum in se*, and therefore within our former exception, no cautious jurist would for a moment entertain such a proposition respecting an usage sanctioned by the practice of all civilized countries for centuries. The court, however, *never gave judgment*, respiting the defendant's recognizances until further order; and thus avoided the difficulty of grappling with this most important question. It was thought by the bar, says Mr. Howell, "that had the opinion of the court been delivered, judgment would have been given against General Picton;" but however this may be, it seems, from the interlocutory language of Lord Ellenborough, that his opinion was the other way.

The reader will find an example of caution in dealing with the same ticklish subject in the evidence of Mr. Maseres, at the bar of the House of Commons, during the discussions on the Canada Bill, in 1774. The opposition sought to prove, that by establishing the French law there, not only would the habeas corpus be taken away, but *lettres de cachet* would be legalized.

"Would it be lawful, if this bill should pass, for the king of Great Britain, or any body else, to issue *lettres de cachet*, to take up any subject in Canada, or in any part of his dominions?"

"I do not think it would be lawful to be done *by any subject* residing in Canada, or at least I think it would be very doubtful; and I freely think if it were done, though not lawful, there would be a remedy against it in the province of Quebec for the persons who suffered by it, the habeas corpus being taken away."—(Sir H. Cavendish's Debates, pp. 134, 135.)

It is worth observing how cautiously the sagacious lawyer avoided grappling with the real difficulty,—too honest to take

refuge in the "fundamental principles of the British constitution, and not quite honest enough to give his examiners a triumph, by suffering himself to be impaled on the other horn of the dilemma; how he takes refuge in the safe propositions, that it is doubtful that *any subject* could imprison by lettres de cachet, and that *if* such imprisonment were illegal, there would be a remedy for it!

Strange to say, we shall find far less cautious and considerate expressions when we turn to the dicta of the greatest of our authorities on matters of international law. We shall find Lord Stowell expressing himself in language which, had it been applied to some practical point at issue, instead of being thrown out extra-judicially as it was, would have sufficed to render uncertain the municipal rights, the status, the property of millions of subjects of the crown of Great Britain; language which not merely goes to establish the exception, but to throw doubt on the very rule itself.

"I am yet to seek *for any principle* derivable from general law, *which subjects the conquerors of a country to the legal institutions of the conquered*. Such a principle may be attended with most severe inconvenience in its operation. The laws may be harsh and oppressive in the extreme; may contain institutions abhorrent to all the feelings, and opinions, and habits of the conqueror; at any rate they can be but imperfectly understood; and that they should all of them instantaneously attach, and continue obligatory upon them, till their own government had time to learn them, and select and correct them, is a proposition which I think a professor of general law would be inclined to consider cautiously, before it could be unreservedly admitted."—*Ruding v. Smith*, 2 Hag. C. C. C. 389.

We apprehend that many of our readers will be as astonished as ourselves at such doctrines proceeding from so venerable an authority. Surely the evils here alluded to are as nothing, in comparison with the enormous injustice of rendering thus uncertain the rights and the condition of unoffending men, who have experienced hardship enough in the forced transfer of their allegiance through the fortunes of war. Torture is a very bad thing, no doubt; and any British governor, who should of his own motion order it in a con-

quered district, would deserve in our opinion far greater severity of public animadversion than visited General Picton, although his gallant actions and brilliant end disposed people at the time to regard him as a persecuted man. But the ill which could be done by the existence of laws sanctioning torture, or *lettres de cachet*, until the sovereign authority could find time to alter them, would be as nothing, compared with that of giving over the whole community as a defenceless prey to legal spoliation, by declaring all laws invalid which are contrary to the "fundamental principles of the British constitution." We certainly agree with Mr. Lewis as to this exception to the general rule, viz. as regards the "fundamental principles" in question, although not as to the other, viz. that respecting things *mala in se*, which he seems to us not to have accurately distinguished from it; that "the most convenient course clearly is, that *all* the laws of a conquered or ceded dependency should remain in force until they are expressly repealed by competent authority."

2. We pass to the common law of colonies founded by British subjects. We have said that it consists, in general, of the law of England, statute and common, as it existed at the period of their respective foundation. "But this," says Blackstone, "must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony: such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force."—1 Com. 107.

So likewise Lord Mansfield. "It is absurd that in the colonies they should carry all the laws of England with them. They carry such only as are applicable to their situation. I remember it has been determined in the council. There was a question whether the statute of charitable uses operated on the Island of Nevis. It was determined it did not; *and no*

laws but such as were applicable to their condition, unless expressly enacted." Campbell v. Hall, 20 Howell's St. Tr. 289.

"The following is the account of the English laws affecting the island of Barbadoes, which is given in the Report of the West India Commissioners. 'The laws in force here are, first, the common law of England; secondly, such acts of parliament as were passed upon the settlement of the island, *and are applicable to its condition*. The bankrupt and poor laws, the laws of police, tithes and the Mortmain Acts, have been treated *as not applicable to the condition of the colony*, and are, therefore, not in force in it.'"—Essay, p. 193.

On the same principle it was determined, that the Mortmain Acts are not in force in Grenada. Attorney General v. Stewart, 2 Merivale, 161.

It is difficult to imagine a principle more vague and uncertain, more calculated to produce endless and unmeaning litigation, than that which these authorities have laid down, and which the reader will find illustrated by the dicta of many other learned individuals in the fifth chapter of Mr. Lewis's book. Who is to decide, what statutes were "applicable to the condition" of an infant colony at the time of its foundation? In every instance, the judges: and they have thus to pronounce an opinion, first, whether the case before them falls within a given statute, and secondly, whether the statute itself falls within the character of being "applicable to the colony;" in other words, whether written law is law or not. In no other civilized country, probably, do judges possess anything like a similar power.

Nor is this a mere theoretical imperfection, a want of completeness in the plan of colonial jurisprudence, such as grieves the eye of the sensitive man of system, but is innocent in practical operation. Probably no single question has produced such an amount of actual litigation in our dependencies as this, respecting the applicability of different portions of the common and statute law, particularly the latter, to their condition. It is an anomaly for which no high reasons of state or of moral expediency can possibly be cited, as in the case of some of those exceptive rules which we have been already considering. Every shilling which has been wasted in ob-

taining a decision on the barren question, whether the bankrupt acts have force in Jamaica, or the mortmain acts in Nevis, has been sacrificed to the careless indolence of the authorities of the mother country, in not providing for British subjects abroad that which they have such abundant right to claim, something like previous assurance under what laws they are to live.

"The most complete attempt of the government of an English colonial dependency," says Mr. Lewis, "to determine how much of the law of England applies to it, is exhibited in an act of the Bahama islands, 40 Geo. 3, entitled 'An Act to declare how much of the Laws of England are practicable in the Bahama Islands, and ought to be in force within the same.'"—See also Clark on the Colonial Laws, p. 368.

This act enumerates a considerable number of statutes as of force in the colony: but it then goes on to enact, in addition, that "all statutes, and parts of statutes, &c. which relate to the prerogatives of the crown or to the allegiance of the people," "also such as declare the rights, liberties, and privileges of the subject," are in force in the island: a provision which apparently extends to all future enactments. This is much too vague. Every statute regulating imprisonment for debt, for instance, may be held to be one declaring the liberties of the subject.

Nor is it, after all, absolutely clear how far the powers of a provincial legislature extend in repealing or altering the common law of the colony. It would, therefore, be highly advisable, and is certainly no more than just, that provision should be made for this most necessary object on the first foundation of every colony which is established by British subjects. We are no special friends to codifying in colonies or elsewhere. But no codification is necessary here. All that is requisite is, that some one should be employed to select from the statute book those acts which shall be deemed in force in the new colony, such selection being subject to the approbation of parliament or of the crown in council. The labour would be very insignificant, for the selection once made would be good, with very little alteration, for all new colonies which may be founded; their circumstances seldom differing so materially as to render it likely that the choice of

statutes would require to be much varied for individual cases. Such an abbreviated statute book would serve as a safe and plain foundation on which the edifice of the subsequent legislation of the settlement might be raised with perfect security. Questions as to the applicability of different portions of the *common law* of the mother country are not likely to be either very numerous or vexatious, and are probably best left to the casual interpretation of the tribunals.

3. We have lastly to notice very briefly a peculiar anomaly, on which Mr. Lewis has not touched. It seems that there are English dependencies to be regarded, in a legal point of view, neither strictly as colonies nor as conquests; in which the law of the former rulers prevails for some purposes, and English law for others: or rather in which what one writer has termed a species of *personal law* prevails. In these dependencies property owned by Englishmen is subject to some of the incidents of English law, while that of the rest of the community is under its own.

In *The Mayor of Lyons v. The East India Company*, the question was whether a Frenchman, who, if resident in England, would have been within the alien laws, could devise his real property in Calcutta.

The questions for the decision of the Court, as set down by Lord Brougham in his judgment, were as follows:—

“Is Calcutta to be considered as an uninhabited district, settled by British subjects, or as an inhabited district obtained by conquest or cession?”

“If it falls within the latter description, has the English law incapacitating aliens ever been introduced?”

“If that law has never been introduced, has there been such an *introduction of the English law generally, that those parts which have been introduced draw along with them the law touching aliens?*”

And the result of the decision appears to be that Calcutta, with its territory, are of the quality *thirdly* enumerated; that there has been an extensive introduction of the English law of real property there, not by statute but by usage, although it is to be regarded for other purposes as a conquered or ceded, not as a colonized district. Thus confirming the decision in *Jardine v. Fell*, 1 Jac. & Walker, 284, that a will unattested

by three witnesses (before the late act) would not pass the real property of a Briton in Calcutta ; and *Freeman v. Fairlie*, there cited, in which it was held that the estate in land and tenements of a Briton in Calcutta was of such a nature as to descend to him according to the English laws of inheritance.

Thus it would appear that under the British government, in the nineteenth century, there subsists an imitation of the old system of personal law which prevailed in the kingdoms dismembered from the Roman empire ; in which Frank, Burgundian, Lombard, or Roman, might each appeal to the laws of his own nation, while all lived together on the same territory, under the same sovereign. It is difficult to see on what grounds of policy or expediency such a curious conflict of rights and jurisprudence can be maintained. But if there are any peculiar reasons why the English community in Calcutta or elsewhere in our foreign possessions should be subject to different laws respecting the inheritance and transmission of property from those which govern the natives, surely it is high time that those exceptional laws should be accurately defined, and that every man should know, when he makes his will or lets a house, whether his dispositions are to be interpreted according to Blackstone's Commentaries or the Institutes of Menu.

With the discussion of this last and oddest of the anomalies connected with our system of colonial law we must conclude this hasty sketch. The whole subject is one demanding far more accurate and extensive investigation, and we shall probably recur to it.

M.

DIGEST OF CASES.

COMMON LAW.

[Comprising 12 Adolphus & Ellis, Part 3; 1 Adolphus & Ellis, New Series, Part 1; 4 Perry & Davison, Part 3; 1 Gale & Davison, Part 5, and 2 Gale & Davison, Part 1; 2 Manning & Granger, Part 3; 3 Scott's New Reports, Part 2; 8 Meeson & Welsby, Part 6; 9 Meeson and Welsby, Parts 1 and 2; 1 Dowling's Practice Cases (New Series), Parts 2 and 3; and a selection from 1 Carrington & Marshman, Part 2;—all cases before digested being omitted.]

ABDUCTION.

Semble, that where a man by false and fraudulent representations induces the parents of a girl under sixteen years of age to allow him to take her away, that is an abduction of the girl within the stat. 9 Geo. 4, c. 31, s. 20.—*Reg. v. Hopkins*, 1 Carr. & M. 254.

ACTION ON THE CASE.

1. (*For negligence, by infant—How far plaintiff disabled from suing by his own negligence.*) Defendant negligently left his horse and cart unattended in the street; plaintiff, a child seven years old, got upon the cart in play, another child incautiously led the horse on, and plaintiff was thereby thrown down and hurt.

Held, that defendant was liable in an action on the case, though plaintiff was a trespasser and contributed to the mischief by his own act; and that it was properly left to the jury, whether defendant's conduct was negligent, and the negligence caused the injury. (5 C. & P. 190; 11 East, 60; 4 Bing. 644; 3 B. & Ald. 304.)—*Lynch v. Nurdin*, 1 Ad. & E. (N. S.) 29.

2. (*When maintainable—Damage, when too remote—Master and servant—Pleading.*) The plaintiffs sued the defendant in case for loss of services of their traveller, from an accidental collision with the defendant: Held, that the action was maintainable, and the damage not too remote, although case and not trespass would have been the proper remedy had the servant been the plaintiff.

The declaration in such action need not allege that the servant was hired at certain wages or salary.—*Martinez v. Gebber*, 3 Scott, N. R. 386.

3. (*When maintainable—Registration of order under 1 & 2 Vict. c. 110—Malice.*) In a suit in Chancery, an order was made that G. should pay into the name of the accountant-general, in trust for the cause, a certain sum admitted by his answer to have been the proceeds of the sale of a trust fund. The solicitor for

the plaintiffs in the suit registered the order under the 1 & 2 Vict. c. 110, s. 19, and in consequence G. was prevented from disposing of certain lands: Held, that the registering of the order was not in itself a wrongful act, and that no action could be maintained for it without proof of malice.—*Gibbs v. Pika*, 1 D. P. C. (N. S.) 409.

AFFIDAVIT.

1. (*Description of deponent.*) Where an affidavit is sworn by a party in a cause, it is sufficient to describe him as plaintiff or defendant, without any addition—such affidavit being intended by the rule of Hilary Term, 2 Will. 4, reg. 1, s. 5. (2 Bing. N. C. 407; 5 M. & W. 163.)—*Shirer v. Walker*, 3 Scott, N. R. 235.
2. (*Using affidavit sworn on former rule.*) A party showing cause against a rule has a right to read an affidavit of his filed in Court, which was made in support of a former application for a rule involving the same question, and of which the other side took an office copy.—*Ryan v. Smith*, 9 M. & W. 223.
3. (*Intitling.*) An affidavit on which a rule for judgment as in case of a nonsuit was founded, was intitled "Between J. S., plaintiff, and G. J., defendant." The affidavit in answer to the rule stated, that there were two G. J.'s, and that all former proceedings in the cause were intitled "G. S. v. G. J. the younger:" Held, that the affidavit was sufficient. (3 D. P. C. 648.)—*Singleton v. Johnson*, 9 M. & W. 67; 1 D. P. C. (N. S.) 356.
4. (*Title—Jurat.*) An affidavit intitled in the Queen's Bench, but which appears by the jurat to have been sworn before a Commissioner of the Exchequer, cannot be used in a matter pending in the Queen's Bench. But after a rule had been discharged on this objection, the Court allowed the application to be renewed on amended affidavits.—*Shaw v. Perkin*, 1 D. P. C. (N. S.) 306.

AFFIDAVIT OF DEBT.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff in 22l. "on the balance of an account for goods sold and delivered by the plaintiff to the defendant," held sufficient, without stating that it was an account stated between the parties. (6 D. P. C. 526.)—*Kenrick v. Davies*, 9 M. & W. 22; 1 D. P. C. (N. S.) 347.

AMENDMENT.

1. (*Under 3 & 4 Will. 4, c. 42, s. 23.*) On a plea of nul tiel record to a declaration in debt on a recognizance of bail, a variance appearing between the amount of the judgment recovered in the original action, and that alleged in the declaration, the Court refused to amend the declaration, holding the variance to be material to the merits.—*Davis v. Dunn*, 1 D. P. C. (N. S.) 317.
2. (*Same.*) Declaration in assumpsit alleged that the defendant was retained by the plaintiff to lay out a sum of money in the purchase of a government annuity for his life; breach, the investment of the money with a private company. The defendant pleaded, that he did not receive the money for the purpose alleged in the declaration. The proof was, that the defendant was employed to lay out the money on a government security: Held, an amendable variance.—*Gurford v. Daley*, 1 D. P. C. (N. S.) 519.

APOTHECARIES' ACTS.

1. (*Evidence of plaintiff's identity with person named in license.*) In an action for medicines and attendances by the plaintiff as an apothecary, the plaintiff put in

evidence a license from the Apothecaries' Company to practise as such, granted to a person bearing the same christian and surname: Held, that this was sufficient *prima facie* evidence to show the identity of the plaintiff with the person named in the license.—*Simpson v. Dismore*, 9 M. & W. 47; 1 D. P. C. (N. S.) 357.

2. In an action to recover the amount of a chemist's bill, it being suggested that the items are properly within the scope of an apothecary's business, the proper question for the jury is, under the 55 Geo. 3, c. 199, ss. 14 and 28, whether the plaintiff has *acted* as an apothecary, and not whether he has *charged* as a chemist or as an apothecary.—*Richmond v. Codes*, 1 D. P. C. (N. S.) 560.

APPORTIONMENT OF RENT.

The owner of a house, having mortgaged it in fee, and continuing in possession, let it as a ready furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished by the week to the defendant, who, after three weeks' occupation, received notice from the mortgagee to pay rent to him: Held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture; that the rent of the house and furniture might be apportioned, or if not, that, upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement might be inferred by the jury to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as a compensation for the use of the furniture to the assignees. (Cro. Jac. 453.)—*Salmon v. Matthews*, 8 M. & W. 827.

ARBITRATION.

1. (*Award, when sufficiently final—Hypothetical adjudication.*) On a submission to arbitration, not giving power to raise questions of law for the opinion of the Court, the arbitrators awarded 82*l.* as compensation for damages, and in a subsequent part of their award they stated, "for the purpose of raising the question for the determination of the Court, in case it should be pleased to entertain the same," that they awarded the 82*l.* on a certain principle, which they explained; but if the Court should think that the damages ought to be estimated on another principle, which they likewise stated, they then awarded a compensation of 102*l.* On motion to set aside the award as not final: Held, that as the sum of 82*l.* was positively awarded, the hypothetical adjudication might be rejected as surplusage and the award sustained.

Assuming that the Court could notice the question of law, *quære* whether, if the positive adjudication had been erroneous (which it was not) they could have sustained the hypothetical one, or must have set aside the award.—*In re Wright and Cromford Canal Company*, 1 Ad. & E. (N. S.) 98.

2. (*Revocation of submission.*) By order of *nisi prius*, all matters in difference in a cause were submitted to arbitration, with liberty to the arbitrator to reserve questions for the opinion of the Court on certain points of law which had been raised at the trial. Evidence was offered before him, to which the defendant objected. The arbitrator thought the objections weighty, but refused to decide upon them, and declared his intention to receive the evidence, stating that he should raise, on his award, such objections to it as appeared to him on consideration to be important; but he declined pledging himself to raise any objection in particular. Defendant thereupon moved the Court for leave to revoke his submission, stating that the admission of the evidence would make many

additional meetings necessary, and cause great expense: Held, no sufficient ground for giving leave (under 3 & 4 Will. 4, c. 42, s. 39,) to revoke the submission, though the objections to evidence might be well founded.—*Scott v. Van Sandau*, 1 Ad. & E. (N. S.) 102.

3. (*Award, when sufficiently final.*) By a deed of submission to arbitration between R. and I. it was recited, that they had been partners; that I. had deposited with C. & Co., bankers, certain securities for such sums as they had or might advance to I., as surety for R.; and that, R. being indebted to the bankers in 4000*l.*, I. had mortgaged to them securities for a sum not exceeding 3000*l.*, and R. and I. had dissolved partnership, and had agreed to refer all matters in difference, &c. And there was a proviso, that if the arbitrator should award any money to be paid by I. to R., they should in their award, if the mortgage was still outstanding, authorize such payment to be made to the bankers in reduction of the mortgage debts, and should further award that R. should, at a time to be named by the arbitrators, pay into the bankers, sum a sum as would be sufficient to entitle I. to have the mortgage discharged. The arbitrators, by their award, found that 3121*l.* was due from I. to R. and the mortgage outstanding, and they ordered I. to pay the 3121*l.* on certain days, with liberty to him to pay it in to the bankers as above stated. They also awarded, that within one month from the payment of the 3121*l.* R. should pay in to the bankers such a sum as would be sufficient to entitle I. to have the mortgage discharged, and the securities deposited by him released. It did not appear by the award what that sum would be: Held, that the award was not final on this point, and therefore was bad.—*Hewitt v. Hewitt*, 1 Ad. & E. (N. S.) 110.
4. (*Correction by the Court of mistake by arbitrators.*) Certain disputes and differences between A. and B. were referred to the arbitrament of three merchants. Before the arbitrators A. admitted that a sum of 143*l.* 15*s.* 11*d.* was due from him to B., but the latter claimed a larger sum; and the arbitrators found that in reality a further of 75*l.* 4*s.* 7*d.* was due from A. to B. Instead, however, of adding these two sums together, and directing A. to pay the aggregate amount to B., the arbitrators by mistake deducted the latter sum from the former, and by a further mistake, directed that B. should pay the difference to A. upon an affidavit of the facts by two of the arbitrators (the third declining to join in the affidavit), the Court set aside the award, the arbitrators having clearly failed to express in the award the intention of their own minds, and the mistake and act of carelessness being so gross as to amount, in the judicial sense of the term, to *misconduct* on the part of the arbitrators.—*In re Hall and Hinds*, 3 Scott, N. R. 250.
5. (*Effect of death of party pending reference—Liability of executor for costs.*) Differences and disputes having arisen between the trustees and managers of a chapel, as to the conduct of B., one of the trustees; and an information and bill having been filed in the Court of Chancery, at the relation of all the trustees (except B.) against B. and another person, praying an account against B., in respect of such part of the trust funds as had come into his hands; and B. having, by his answer, charged the relators with breach of trust in their management of the trust fund, an order was made by the Vice-Chancellor, with the consent of all parties, that the cause and all matters in difference should be referred to arbitration, the arbitrator to have full authority over the costs of the suit and reference. The order expressly provided, that the death of any of the parties should not operate as a revocation of the arbitrator's authority, but that

his award should be delivered to the personal representatives of the deceased party or parties. During the reference, one of the relators, being a party thereto, died; and afterwards the arbitrator made his award, and thereby directed that the costs of the reference should be borne and paid by the parties by whom they were incurred. The plaintiff, who was one of the relators, paid the solicitor who had been retained for them in the conduct of the reference, his bill of costs, and brought an action for money paid against the executors of the deceased relator, for his proportion of the costs incurred after his death, including the costs of the award: Held, that the executors were liable in such action for their testator's proportion of the costs of the reference incurred after his death, and also of the costs of the award. (6 M. & Sel. 158.)—*Prior v. Hambrow*, 8 M. & W. 873.

6. (*Power of arbitrator to examine the parties.*) Where a cause is referred to arbitration, with power to the arbitrator to settle all matters in difference between the parties, the submission providing also that the parties respectively are to be examined on oath, if thought necessary by him, it is in the discretion of the arbitrator to examine the parties, each in support of his own case, if he think fit.—*Wells v. Benskin*, 9 M. & W. 45; 1 D. P. C. (N. S.) 342.

7. (*Award—Repugnancy—Several issues—Contingent damages on demurrer.*) Assumpsit on an agreement to build a house according to certain drawings, plans, and specifications, and to the satisfaction of the plaintiff, and with the best materials; alleging as breaches that the defendant did not build the house to the satisfaction of the plaintiff, and that he did not perform the work with the best materials. Pleas, 1st, non-assumpsit; 2ndly, that the defendant did the works to the satisfaction of the plaintiff; 3rd, that before the breach the contract was rescinded; 4th, leave and licence; 5th, that the defendant deviated from the drawings by the direction of the plaintiff's architect; 6th, a plea stating an agreement between plaintiff and defendant to build a stone wall in lieu of the wall mentioned in the original agreement; 7th, that the defendant, by command of the plaintiff, erected a stone wall instead of a brick wall. The plaintiff took issue on the two first pleas, traversed the 3rd, 6th, and 7th, replied *de injuriâ* to the 4th, and demurred to the 5th. The cause was at the assizes referred to an arbitrator, the costs of the cause and reference to abide the event; and he awarded a general verdict to be entered for the defendant.

Held, that the award was not uncertain, inconsistent, or repugnant, and that it was not necessary for the arbitrator to assess contingent damages on the demurrer, neither party having requested him to do so, but acted as if the matter had not been submitted to him.

Held, also, that the 5th plea was bad on general demurrer, the architect not being shown to be the plaintiff's agent to bind him by any deviations from the drawing.—*Cooper v. Langdon*, 9 M. & W. 60; 1 D. P. C. (N. S.) 392.

8. (*Award, when sufficiently final—Power to arbitrator to enter nonsuit.*) A cause and all matters in difference between the parties (there being no matters in difference except in the cause) were referred by order of nisi prius to the award, order, arbitrament, final end, and determination of A. B.; the order providing, that the verdict should be entered for the plaintiff for the damages in the declaration, subject to be reduced or vacated, or instead thereof a verdict for the defendant or a nonsuit entered, according to his award. The arbitrator, by his award, directed that the verdict entered for the plaintiff should be vacated, and a

nonsuit entered: Held (Parke, B., dissentiente), that the award was bad, as not finally determining the matters in difference in the cause.—*Wild v. Holt*, 9 M. & W. 161.

9. (*Attachment for non-performance of award, how waived.*) An arbitrator having by his award ordered the defendant to pay to the plaintiff a sum of money, the plaintiff filed an affidavit of debt in the Court of Bankruptcy, under stat. 1 & 2 Vict. c. 110, and the defendant gave a bond, with sureties, conditioned for payment of the money, but omitting the alternative in the statute, of rendering himself to custody: Held, that the plaintiff's having adopted this proceeding did not preclude him from applying for an attachment for non-performance of the award and rule of Court thereon.—*Mendell v. Tyrrell*, 9 M. & W. 217; 1 D. P. C. (N. S.) 453.

10. (*Award, when sufficiently final—Adjudication of all matters in difference—Statement of grounds in rule for setting aside award.*) In a rule nisi for setting aside an award, an objection "that the arbitrator has not awarded on a matter in difference submitted to him" is sufficiently specific.

A declaration on an agreement to supply timber and slates to the plaintiff for building a house, alleged as a breach the non-supply of timber only. The defendant pleaded—1st, non-assumpsit; 2nd, that he did supply the timber; 3rd, part payment. The cause and all matters in difference were referred, and the arbitrator, by his award, after reciting that he had heard the evidence produced "touching the matters in difference," stated that he made his award "of and concerning the premises," and then proceeded to find specially on each of the issues in the action: Held, that the award was sufficient, although it appeared that there was a matter in difference submitted to the arbitrator as to the non-supply of slates. (1 B. & Ald. 106.)—*Dunn v. Warters*, 9 M. & W. 293.

11. (*Indorsement of enlargement of time for award.*) Where an order of reference authorized the arbitration to enlarge the time to the 2nd Nov. 1841, "or to such other ulterior day as the said arbitrator shall ultimately appoint and signify in writing under his hand, to be indorsed on the said order of reference:" Held, that the enlargement subsequent to the 2nd Nov. only need be indorsed on the order of reference.—*Davison v. Gauntlett*, 1 D. P. C. (N. S.) 198.

12. (*Award, when sufficiently final.*) Where a cause and all matters in dispute between the parties were referred to an arbitrator, and he awarded that the plaintiff had no cause of action: Held sufficient, it not being shown that any matter in dispute beyond the action was brought before him.—*Wyatt v. Curnell*, 1 D. P. C. (N. S.) 327.

13. (*Setting aside award—Making enlargement of time part of rule of Court.*) Where it is sought to set aside and not to enforce an award, it is not necessary to make the enlargement of the time for making the award part of the rule of Court.—*In re Welsh*, 1 D. P. C. (N. S.) 331.

14. On showing cause against a rule requiring a party to pay money pursuant to an award, it is competent to object to the validity of the award: but the Court will not entertain the discussion on the last day of term.—*Kerr v. Jeston*, 1 D. P. C. (N. S.) 340.

15. (*Compelling affidavit of execution of agreement of reference.*) In order to compel the attesting witness to an agreement of reference to make an affidavit of its execution, the affidavit, and the expenses attending the making of it, ought to be tendered to him.—*Ex parte Pike*, 1 D. P. C. (N. S.) 275.

16. (*Proceedings on award under 1 & 2 Vict. c. 110, s. 18.*) In moving for a rule upon a party to pay money pursuant to an award, in order to obtain a judgment thereon under 1 & 2 Vict. c. 110, s. 18, it is not necessary to make it part of the rule that the applicant should be at liberty to issue execution, &c. or that he foregoes his remedy by attachment.—*Burton v. Mendisabel*, 1 D. P. C. (N. S.) 336.
17. (*Enlargement of time—Computation of time.*) Where an arbitrator enlarges the time for making his award "until" a certain day, the time will be computed exclusively of that day. (Cowp. 714.)—*Kerr v. Jeston*, 1 D. P. C. (N. S.) 538. And see *COSTS*, 2, 5.

ARREST.

1. (*Detainer, after issue of irregular writ.*) Where a defendant has been regularly arrested on an attachment out of Chancery, the fact of an irregular writ of ca. sa. issuing out of the Common Pleas against the defendant, after the arrest, does not interfere with the right of another plaintiff to detain the defendant by virtue of a subsequent ca. sa. (10 Ad. & E. 570.)—*Wright v. Stanford*, 1 D. P. C. (N. S.) 273.
2. (*Deposit in lieu of bail.*) Where a defendant arrested under 1 & 2 Vict. c. 110, deposits money with the sheriff in lieu of bail, under s. 4, and subsequently neglects to put in bail to the action, the plaintiff is entitled to take the money out of Court, without waiting for the final determination of the action.—*Tuton v. Gale*, 1 D. P. C. (N. S.) 383.
3. (*Affidavit for capias—Description of plaintiff.*) The affidavit on an application for a capias described the plaintiff as "J. R., one of the public officers of the Western District Banking Company, for Cornwall and Devon:" but the latter words were omitted in the writ. The Court discharged, without costs, a rule nisi for the defendant's discharge out of custody, on the plaintiff's filing an affidavit corresponding with the writ.—*Richards v. Dispraille*, 1 D. P. C. (N. S.) 384.

And see *ATTACHMENT*, 4; *ATTORNEY*, 2; *PROCESS*, 5, 7.

ARTICLES OF THE PEACE.

On habeas corpus bringing up a party committed by justices for not finding sureties of the peace, the Court will not hear affidavits controverting the facts alleged in the articles of the peace. The stat. 56 Geo. 3, c. 100, s. 3, does not affect the practice in this respect.

Where a party exhibiting articles of peace alleges, as the ground of fear, expressions in a letter which he submits to the Court for their construction, the Court will not take the words into consideration, nor act upon the articles, unless the whole letter be set forth.

Where the sessions, upon articles of the peace being exhibited, have ordered sureties to be found, and committed the accused parties for want of them, their judgment is not final, but the Court, on habeas corpus and certiorari, will examine the articles, and if they are upon the face of them insufficient, supersede the order of sessions as made without jurisdiction, and discharge the prisoner.

Articles of peace are not sufficient unless they show a threat. The threat need not be in words, but may be inferred from the course of conduct. That inference, however, must be drawn by the exhibitant himself; and, if he omit to state it in the articles, the Court will not draw the inference. The exhibitant may allege, as part of his ground for apprehension, misconduct which has been the subject of

former articles, although the accused party was committed on those articles for want of sureties, and discharged on habeas corpus, and a commitment on such new articles will not be contrary to stat. 31 Car. 2, c. 2, s. 6.—*Reg. v. Dunn*, 12 Ad. & E. 699; 4 P. & D. 415; see also *Reg. v. Stanhope*, 12 Ad. & E. 620.

ASSAULT.

1. (*Justices' certificate of dismissal of information for assault, when to be granted—Pleading.*) Indictment found January, 1839, for an assault. Pleas, that the prosecutor had complained of the same assault to two justices, who deemed it not to be proved, and thereupon dismissed the complaint, and gave a certificate of dismissal forthwith, under stat. 9 Geo. 4, c. 31, s. 27. Replication, that plaintiff did not obtain such certificate in manner and form, &c. Special verdict, finding a hearing and dismissal of the complaint, 29th November, 1838, and certificate obtained 29th January, 1839.

Held, (by Lord Denman, C. J., and *semble per Williams, J.*, *dubitante Coleridge, J.*), that the replication put in issue the fact of the certificate having been obtained forthwith.

Held, also, that such dismissal not being equivalent to an acquittal at common law, and not constituting a defence, except under the statute, the certificate pleaded must appear to have been obtained forthwith.

And that the certificate in this case was not obtained forthwith.—*Reg. v. Robinson*, 12 Ad. & E. 672; 4 P. & D. 391.

2. (*Conviction for, on indictment for felony.*) The burglariously breaking and entering a dwelling-house with intent to commit a rape, is not a crime which includes an assault; and therefore, on an indictment for that offence, the prisoner cannot be convicted of an assault, under the stat. 1 Vict. c. 85, s. 11.—*Reg. v. Watkins*, 1 Carr. & M. 264.

ASSUMPSIT.

(*Consideration—Illegal contract—Pleading.*) The plaintiff, being a cook in the merchant service, agreed with the defendant, a captain in command of one of her majesty's ships, to undertake the office of captain's cook on board his ship, upon the defendant's promise to pay him wages beyond the government pay to which he was entitled; in pursuance of that contract he went on board the defendant's ship, and performed the duties of captain's cook: Held, that there was a good contract founded on a sufficient consideration, and that the plaintiff was entitled to recover in an action of assumpsit for work and labour.

Quare, whether such contract was illegal. But at all events the illegality must be specially pleaded.—*Clutterbuck v. Coffin*, 1 D. P. C. (N. S.) 479; 1 Carr. & M.

ATTACHMENT.

1. (*When waived.*) A plaintiff does not waive his right to an attachment against the sheriff for not duly returning a writ of *fi. fa.*, by directing him, after the expiration of the rule to return the writ, to proceed with the execution, which had been suspended by an adverse claim.—*Howitt v. Rickaby*, 9 M. & W. 52; 1 D. P. C. (N. S.) 389.
2. (*Personal service—Rule under 1 & 2 Vict. c. 110, s. 18.*) Where the master's allocatur on the consent rule in an action of ejectment could not be personally served, so as to obtain an attachment, the Court granted a rule to show cause why the defendant should not pay the sum mentioned in the allocatur, so as to take advantage of the stat. 1 & 2 Vict. c. 110, s. 18; and on a special affidavit

of circumstances, showing that personal service could not be effected, made that rule absolute.—*Doe d. Steer v. Bradley*, 1 D. P. C. (N. S.) 259; see also *Jordan v. Berwick*, id. 271.

3. (*Elisors.*) Where the coroner is the defendant in the action, a writ of attachment against the sheriff must issue to the elisors in the first instance.—*Reg. v. Sheriff of Glamorganshire*, 1 D. P. C. (N. S.) 308.
4. (*Waiver of.*) Where a defendant has been arrested and given bail to the sheriff, under the 1 & 2 Vict. c. 110, the plaintiff does not, by declaring in chief, waive his right to attach the sheriff for not bringing in the body.—*Reg. v. Sheriff of Montgomeryshire*, in *Rogers v. Astley*, 1 D. P. C. (N. S.) 388.

ATTORNEY.

1. (*Admission—Production of articles.*) Where a clerk had served regularly under his articles, but, in consequence of his master's absconding, could not procure the articles of clerkship, which he had left with him, the Court, on production of a certificate of their enrolment, allowed the clerk to be admitted without producing the articles themselves.—*Ex parte Nicholls*, 1 D. P. C. (N. S.) 263; see also *Ex parte Carr*, id. 565.
2. (*Arrest of.*) An attorney who is about to quit England may be arrested pursuant to 1 & 2 Vict. c. 110, s. 3, notwithstanding his being an officer of the Court.—*Thomson v. Moore*, 1 D. P. C. (N. S.) 283.
3. (*Attorney and client.*) Where money had been wrongfully detained by an attorney from his client, and a rule requiring him to pay the money over had been made absolute against him; it being shown clearly that he was aware of what the rule required him to do, the Court granted a rule absolute in the first instance for an attachment against him, he not having complied with the rule.—*Ex parte Burgin*, 1 D. P. C. (N. S.) 292.
4. (*Privileged communication to.*) An attorney, although he has received a document from his client, is not privileged from answering a question, put for the purpose of letting in secondary evidence, whether the document is in his possession. (*Moo. & M.* 234.)—*Coates v. Birch*, 1 G. & D. 647; S. C. nom. *Coates v. Mudge*, 1 D. P. C. (N. S.) 540.

And see PLEADING, 5; TITHE COMMUTATION ACT, 2.

AUTERFOIS ACQUIT.

An acquittal of an offence charged as a larceny cannot be pleaded in bar to a subsequent indictment for the same offence charged as obtaining property by false pretences.—*Reg. v. Henderson*, 1 Carr. & M. 328.

BANKRUPTCY.

1. (*Title of assignees by relation—Building contract with bankrupt—Evidence of act of bankruptcy.*) In an action by the assignees of a bankrupt to recover property of the bankrupt, a letter written by him during his absence from home, stating that he was absent to avoid two writs that were out against him, is admissible evidence for the plaintiffs of an act of bankruptcy, without proof that there was in fact any writ issued, or any pressure of creditors.

In order to make the declaration of a bankrupt admissible evidence of an act of bankruptcy, it is not essential that the declaration and act shall be contemporaneous. A contract under seal by a trader to execute certain works for the defendant, contained a stipulation that if the contractor should become bankrupt or insolvent, or should from any other cause (not arising from the act of the

defendant) be prevented from, or delayed in, proceeding with the works, it should be lawful for defendant to give notice to the contractor requiring him to proceed regularly with them; and in case the contractor should, for seven days after the notice, make default in proceeding, it should be lawful for defendant to employ others to complete the work at the contractor's expense, and that all advances made by the defendant on account, before such default, should be taken as full payment for all the work done by the contractor; and that all the balance due to him, and all tools and materials then delivered for and being upon the works, should, upon such default, become the absolute property of defendant, and that all materials brought and left on the works by the contractor, to be permanently used on or about the same, should, from the time of being so brought and left, be considered as the property of defendant, and should not be removed without his consent.

The contractor having made default in proceeding with the work, defendant, on the 11th April, duly served him with notice to proceed: on the 17th April the contractor committed an act of bankruptcy.

Held, that the defendant could not on the 19th April take possession of the tools and materials left by the bankrupt upon the work at the time of the bankruptcy, because the title of the assignees was complete, by relation, on the 17th. —*Rouch v. Great Western Railway Company*, 1 Ad. & E. (N. S.) 51.

2. (*Conveyance by trader, when an act of bankruptcy—Interpleader issue—Right of defendant to set up jus tertii.*) A conveyance by a trader of all his effects in a given place is not an act of bankruptcy, unless it be shown that he possesses no other property.

The sheriff seized under a *fi. fa.*, at the suit of G., certain goods in the possession of one W. The goods were claimed by C. and H. respectively, under three several mortgages from W. Upon an issue directed under the Interpleader Act to try their right, C. and H. being plaintiffs, and G., the execution creditor, defendant: Held, that it was competent to the defendant to set up the title of the assignees of W., who had become bankrupt. (7 M. & W. 183.)—*Chase v. Goble*, 3 Scott's N. R. 245.

3. (*When put in issue—Interpleader issue—Notice to dispute bankruptcy—Act of bankruptcy—Scrivener.*) Certain goods of S. having been taken under a *fi. fa.*, the assignees of S. (who had been declared a bankrupt) preferred a claim, whereupon an issue was directed, under the Interpleader Act, in which the assignees were plaintiffs, and the execution creditors defendants, to try whether at the time of the seizure of the goods "the plaintiffs were entitled to the same as against and free from the execution, or whether the goods were subject and liable to be so seized and levied under the said writ or not, as against the plaintiff:" Held, that this put in issue the bankruptcy of S. Held, also, that a feigned issue is not within the 90th sect. of the 6 Geo. 4, c. 16, so as to require the defendant to give notice of his intention to dispute the petitioning creditor's debt, trading or act of bankruptcy.

In order to render an attorney liable to the bankrupt laws as a "scrivener receiving other men's monies into his trust or custody," it is not enough to show that he has negotiated loans and charged procuration money; it must distinctly appear that he has been entrusted (as a general means of obtaining a livelihood) in the language of the statute. (3 Campb. 534.)—*Lott v. Melville*, 3 Scott's N. R. 346.

4. (*What rights of action pass to assignees.*) A. agreed in writing with B. and C.,

on behalf of themselves and D., as partners in the business of type foundry, faithfully to serve them, and the survivor of them, for seven years, as their foreman, and not to engage in trade on his own account for that period without their consent; and B. and C. agreed to pay him wages after the rate of 3*l.* 3*s.* weekly, so long as he should serve them faithfully: Held, that the right of action for a breach of this agreement, by the dismissal of A. from their service without reasonable cause, did not pass to the assignees of A. on his bankruptcy; the contract relating to the employment of the personal skill and labour of the bankrupt, and the damages for the breach of it being compounded partly of the personal inconvenience to himself, and partly of the consequential loss to his personal estate. (Cooke's Bankrupt Laws, 260; 1 Esp. 140; 2 M. & Sel. 408; 2 B. & Adol. 727; 2 C., M. & R. 588; 8 Bing. 358; 8 M. & W. 601.)—*Beckham v. Drake*, 8 M. & W. 846.

5. (*Right of bankrupt to apply to set aside verdict.*) A defendant who has become bankrupt and obtained his certificate after trial and verdict against him, has a right to set it aside for the want of a sufficient notice of trial, although his estate is insolvent, and his assignees are no parties to the application.—*Shepherd v. Thompson*, 9 M. & W. 110; 1 D. P. C. (N. S.) 345.

And see PERJURY, 2.

BARBERS' COMPANY. See JURY, 1.

BENEFICE. See DILAPIDATIONS.

BENEFIT SOCIETY.

(*Larceny from—Property, in whom to be laid.*) Where one of the trustees of a society enrolled under the stat. 10 Geo. 4, c. 56, and 4 & 5 Will. 4, c. 40, steals the money of the society, he may, by virtue of the stat. 10 Geo. 4, c. 56, s. 21, be convicted on an indictment laying the property in the treasurer.—*Reg. v. Cain*, 1 Carr. & M. 309.

BILLS AND NOTES.

1. (*Notice of dishonour, evidence of.*) In assumpsit against drawer and indorser of a bill of exchange, the issue being whether the defendant had received notice of dishonour, a declaration by him to a party (not the holder) that he should pay the bill, and should not avail himself of the informality of notice, is evidence from which a jury may infer that defendant had due notice.—*Brownell v. Bonney*, 1 Ad. & E. (N. S.) 39.
2. (*Bill drawn abroad—Notice of dishonour—Lex loci contractus.*) In an action by indorsee against the payee and indorser of a bill of exchange drawn in England on and accepted by a French house, both plaintiff and defendant being domiciled in England: Held, that due notice of the dishonour by acceptor was parcel of the contract; that the bill being made payable by the acceptor abroad, was a foreign bill, and the *lex loci contractus* must therefore prevail; and that it was sufficient for plaintiff to show that he had given defendant such notice of the dishonour and protest as was required by the law of France.—*Rothschild v. Currie*, 1 Ad. & E. (N. S.) 43.
3. (*Damages on judgment upon demurrer, in action on bill of exchange.*) Where a plaintiff on a bill of exchange has obtained judgment on demurrer, he is entitled, at the assessment of damages on the demurrer, to the full amount of the bill, without producing it in evidence.—*Lane v. Mullins*, 1 G. & D. 712; 1 D. P. C. (N. S.) 562.

4. (*Alteration of bill, by whom to be accounted for.*) Where a bill of exchange has been altered in its date, it is incumbent on the plaintiff (though the action is between the original parties to the bill) to give some evidence of the circumstances under which the alteration took place; it cannot be left to the jury, upon the mere view of the instrument, to say whether the alteration took place before or after the acceptance. (8 Ad. & E. 215.)—*Clifford v. Parker*, 3 Scott's N. R. 233.
5. (*Alteration of bill—Evidence.*) In an action on a promissory note by the payee against the maker, it appeared that the note had been altered, the words "or order" having been originally "or other;" there was no direct evidence to show when the alteration took place, but the person who drew the note (who professed to have no recollection as to the alteration) stated that the note as produced represented the intention of the parties, and it further appeared that there had been several payments on account of interest on the note: Held, that this was reasonable evidence whence it might be assumed that the alteration took place with the assent of the defendant.—*Cariss v. Tattersall*, 3 Scott, N. R. 257.
6. (*Promissory note payable on demand, negotiability of.*) A promissory note, payable on demand, cannot be treated as over-due, so as affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest had been paid on it for several years before such indorsement.—*Brooks v. Mitchell*, 9 M. & W. 15.
7. (*Proof of identity of defendant as acceptor.*) In an action by indorsee against maker of a promissory note, the defendant pleaded, 1, that he did not make the note; 2, that he made it for the accommodation of the plaintiff. There was an attesting witness to the note, who, on being called at the trial, stated that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that this was a common name in the neighbourhood where the note was made: Held, that there was no evidence to go to the jury of the identity of the defendant with the maker of the note, and that the second plea could not be called in aid for that purpose. (1 C. & M. 511.)—*Jones v. Jones*, 9 M. & W. 75.
8. (*Proof of identity of defendant as acceptor.*) In an action by indorsee against acceptor of a bill of exchange, it appeared that the bill was directed to "Charles Banner Crawford, East India House," and accepted "C. B. Crawford." It was proved that this signature was the handwriting of a gentleman of that name, formerly a clerk in the East India House, who had left it five years ago: Held, that this was sufficient evidence of the identity of the defendant with the person whose handwriting was proved—*Greenshields v. Crawford*, 9 M. & W. 314; 1 D. P. C. (N. S.) 439.
9. (*Pleading—Allegation of promise to pay.*) In an action by the indorsee against the drawer of a bill of exchange, the omission of a promise by the drawer to pay is at most merely matter of form, which can only be taken advantage of on special demurrer. And *semble*, the allegation of a promise is in such case unnecessary altogether. (2 M. & W. 56.)—*Stericker v. Barker*, 8 M. & W. 321; 1 D. P. C. (N. S.) 370.
10. (*Pleading—Description of firm as drawers of bill.*) Declaration by indorsee against acceptor of a bill stated it to be drawn by "certain persons using the name, style, and firm of M. & Co.," and that "the said M. & Co." indorsed it, *Semble*, this was not a sufficient description, as it did not show that M. & Co.

drew or indorsed the bill in that name.—*Ball v. Gordon*, 9 M. & W. 345. But a declaration stating that the bill was drawn by "certain persons by and under the name &c., of G. & Son," and that "the said persons, by and under the said name &c., of G. & Son," indorsed it, was held good on special demurrer.—*Tigar v. Gordon*, id. 347.

11. (*Promissory note, what is.*) An instrument in these terms, "six months after date pay without acceptance to the order of J. C. F. 100*l.*, value received," issued from a branch bank of a joint stock banking Company, of which J. C. F. was managing director, and signed by T. N. as "for the directors," held to be a promissory note of the company.—*Miller v. Thompson*, 1 D. P. C. (N. S.) 199.
12. (*Debt, when maintainable on promissory note—Privity of contract.*) Debt by payee against maker of a joint and several promissory note, payable on demand, for value received. Plea, that the note was made by defendant and G. W., and was signed by defendant at the request of G. W., for the security to the plaintiff of the amount thereof, and that defendant never had any consideration for the note. Replication, that the defendant had consideration: Held, on demurrer, that there was sufficient privity of contract between the plaintiff and defendant to sustain the action. (5 M. & W. 295.)—*Sison v. Kidman*, 1 D. P. C. (N. S.) 493.

And see PARTNERSHIP, 2; PLEADING, 12, 14, 21, 29.

BOND.

1. (*Action on, against devisee.*) Where the obligor of a bond, having devised his land, died before the passing of the stat. 1 Will. 4, c. 47: Held, that the specialty creditor could not maintain an action against the devisee alone, there being no heir, under 3 W. & M., c. 14, s. 3. (1 P. Wms. 100.)—*Hunting v. Sheldrake*, 9 M. & W. 256.
2. (*Construction of condition.*) The condition of a bond, after reciting that A. B. had filed a bill in Chancery against several persons (naming them), and the now defendant, as defendants, was that the now defendant should pay all such costs as the Court of Chancery should award to all the said defendants: Held, that the construction of this condition was, that the defendant should pay the costs awarded to all or any of the defendants except himself.—*Vesey v. Mantell*, 9 M. & W. 323.
3. (*Execution of bond by several sureties.*) To a declaration stating that T. was lessee of certain tolls, and that S. and the defendant agreed to join with T. in a bond conditioned for payment of the rent, and alleging as a breach that the defendant refused to join T. in the bond; the defendant pleaded; first, that at the time of tendering the bond to him, S. had not executed it, nor was he present ready to execute it jointly with the defendant: 2nd, that S. died before the commencement of the suit, and that before his death the bond was not tendered to the defendant for execution, nor was he requested to execute it: Held, that the pleas were bad.—*Horne v. Ramsdale*, 9 M. & W. 329.
4. (*Payment into Court in action on.*) Payment of money into Court, under the 4 & 5 Ann. c. 16, s. 13, in discharge of principal and interest on a bond, and costs, cannot be pleaded to an action on the bond.—*England v. Watson*, 9 M. & W. 333; 1 D. P. C. (N. S.) 392.

BROKER.

(*Duty of, as to keeping goods—Pleading—Allegation of duty.*) A declaration in case stated that the plaintiff employed the defendant as a broker to sell certain

goods, and to deliver the same according to the terms of the contracts of sale to such persons as should become the purchasers thereof: that defendant, as such broker, made a contract between the plaintiff and a purchaser for the sale of such goods, to be paid for on delivery to the purchaser, less $2\frac{1}{2}$ per cent.: that in pursuance of the contract the plaintiff consigned the goods to the defendant to be delivered by him to the said purchaser, upon the price being paid on delivery, less $2\frac{1}{2}$ per cent.: that thereupon it became defendant's duty as such broker to take care that the goods should not be delivered to the purchaser or any other person without being paid for: yet defendant contriving &c., did not use reasonable care on that behalf, in consequence of which the goods were delivered to other persons than the purchaser without payment, by reason whereof, the purchaser having become bankrupt, the plaintiff had lost the price of the goods: Held, that the declaration alleged the duty of keeping the goods until payment to result from the defendant's character as a broker, that no such duty did result from that character, and that the declaration was bad after verdict.—*Boorman v. Brown*, 4 P. & D. 401.

BURGLARY.

Where a servant pretended to concur with two others who had proposed to him to rob his master's house, and having communicated with the police, under their instructions let in the two at night by lifting the latch of the door: Held, that this was not a sufficient breaking to constitute a burglary.—*Reg. v. Johnson*, 1 Carr. & M. 218.

BURNING SHIPS.

A person may be tried, under the stats. 7 Will. 4 & 1 Vict. c. 89, ss. 6 & 11, as an accessory before the fact to the offence of setting fire to a vessel of which he was at the time a part owner.—*Reg. v. Wallace*, 1 Carr. & M. 200.

CANAL ACT. See NAVIGATION ACT; TOLLS.

CARRIERS' ACT.

The 1 Will. 4, c. 68, s. 1, protects a carrier from liability even for gross negligence in respect of silks and other goods therein enumerated above the value of 10*l.*, unless at the time of their delivery to the carrier their value and nature is declared, and an agreement entered into to pay the extra charge for them, as provided by sect. 2. (4 Price, 31; 8 Taunt. 144; 2 B. & Ald. 356; 2 C. & M. 353.)—*Hinton v. Dibbin*, 2 G. & D. 36.

CENTRAL CRIMINAL COURT.

An accessory before the fact to a felony committed on the high seas, within the jurisdiction of the Admiralty, may be indicted and tried at the Central Criminal Court, under the statutes 7 Geo. 4, c. 64, s. 9, and 4 & 5 Will. 4, c. 36, s. 22, although the person charged as principal has not been "committed to or detained in" the gaol of Newgate for his offence.—*Reg. v. Wallace*, 1 Carr. & M. 200.

And see JURY, 1.

CERTIORARI.

1. (*When taken away.*) A conviction under 17 Geo. 3, c. 56, s. 6, for embezzling materials, although it has been confirmed on appeal, cannot be removed by certiorari, the writ being taken away by sect. 22 of that statute. (3 D. & R. 36.)—*Reg. v. Cook*, 1 D. P. C. (N. S.) 300.
2. (*Procedendo—Justification of bail.*) Where a cause was removed by certiorari from the Lord Mayor's Court by the defendant, and the plaintiff served the de-

defendant with a common rule for a procedendo, the defendant has a right to give notice of justifying bail, which he has already put in, and of which he has given notice, without waiting till he is served by the plaintiff with a rule for better bail; and if the plaintiff objects to such justification, he is bound to attend before the judge when the bail appear to justify; if he does not, and the bail are allowed, he cannot treat the rule for the allowance as a nullity, and issue a procedendo.—*Scarnett v. Rice*, 1 D. P. C. (N. S.) 333.

3. (*In criminal case.*) The Court refused to grant a certiorari to remove an indictment for perjury from the county of Leicester to London, to be tried by a special jury, on a suggestion that the truth of the evidence given by the defendant would depend on the result of a long series of accounts, and that a point of law was likely to be raised in his favour.—*Reg. v. Morton*, 1 D. P. C. (N. S.) 543.
4. (*Costs upon—Party grieved, who is.*) An indictment for a libel charged to have a tendency to produce a riot and disturbance at a political meeting, was removed by certiorari at the defendant's instance: Held, that a person injured at a riot which took place at such meeting was not a party grieved within the meaning of the 5 Will. & M. c. 11, s. 3, and not entitled to costs, although the defendants were convicted on the indictment.—*Reg. v. Caldecott*, 1 D. P. C. (N. S.) 556.

CHAPLAIN. See POOR LAWS' AMENDMENT ACT, 2.

CHEQUE.

(*Post-dated cheque not admissible as evidence of money paid.*) A post-dated cheque is altogether void, and cannot be received in evidence for any purpose. Therefore, the plaintiff cannot, in an action on such an instrument, resort to the count for money paid, because he cannot prove it without producing the cheque.—*Serle v. Norton*, 9 M. & W. 309.

CLERGY. See DILAPIDATIONS.

COGNOVIT.

1. (*Attestation.*) Sect. 9 of stat. 1 & 2 Vict. c. 110, enacting that no cognovit actionem shall be of force, unless an attorney on behalf of defendant be present, &c. applies to actions of ejectment.—*Doe d. Rees v. Howell*, 12 Ad. & E. 696; 4 P. & D. 361.
2. (*What amounts to.*) The stat. 1 & 2 Vict. c. 110, s. 9, which regulates the mode of taking cognovits and warrants of attorney, does not apply to the case of a consent in writing by a defendant, though a judge's order may be obtained to permit the plaintiff to sign judgment unless the debt and costs are paid within a certain time. (8 M. & W. 668, 670).—*Thorne v. Neale*, 2 G. & D. 48.

COINING.

(*Joint possession.*) Where two persons were apprehended together, one having on him sixteen pieces of counterfeit coin, and the other two pieces only: Held, that both might be convicted of having in his possession more than three pieces of counterfeit coin, under the statute 2 Will. 4, c. 34, s. 8.—*Reg. v. Williams*, 1 Carr. & M. 259.

COMMITMENT. See SMUGGLING; VAGRANT ACT.

CONCEALMENT OF BIRTH.

The endeavouring to conceal the birth of a child by placing its dead body between a bed and a mattress, was held to be a sufficient disposing of the body to constitute an offence within the stat. 9 Geo. 4, c. 31, s. 14; for it is not essential

to such offence that the body should be put in some place intended for its final deposit, or be buried or destroyed. [Overruling *Reg. v. Ash*, 2 M. & Rob. 294, and *Reg. v. Bell*, ib. note.]—*Reg. v. Goldthorpe*, 1 Carr. & M. 335.

CONSPIRACY.

(*Indictment*.) An indictment for conspiracy charged the defendant with conspiring with other persons unknown to cheat and defraud J. D. and others, and laid as overt acts, that by certain false pretences made to J. D., and under colour of a pretended contract with him for the purchase of goods of the said J. D. and others, he obtained certain goods of the said J. D. and others, with intent to defraud the said J. D. and others: Held, that the words "and others," throughout this indictment, must be taken to mean others the partners of J. D., and not other persons wholly unconnected with him; and therefore that evidence was not admissible on the trial to show that the defendant attempted to commit similar frauds on other persons not connected with J. D.—*Reg. v. Steel*, 1 Carr. & M. 337.

CONTRACT OF SALE.

1. (*Construction of—Right of possession of goods, where it vests in purchaser—Lien of unpaid vendor.*) The defendants sold the plaintiffs a parcel of wheat under the following contract: "Sold, the 25th August, 1836, to Messrs. J. W. & Son, about 300 quarters of wheat as per sample, at 50s. per quarter on board, payment by banker's draft on London, at two months' date, to be remitted on receipt of the invoice and bill of lading." The wheat was shipped on the 27th, under a bill of lading making it deliverable to order or assigns, and the defendant caused an insurance to be effected thereon, and sent the plaintiffs the bill of lading indorsed generally, and an invoice stating the wheat to be shipped by order, and for the account and risk of the plaintiffs. On receipt of the invoice and bill of lading, the plaintiffs, instead of a "banker's draft on London," transmitted to the defendants their own acceptance for the invoice price, which defendants immediately returned, with an intimation to the plaintiffs that it was contrary to agreement, and that they had arranged otherwise for the disposal of the cargo: Held, that under this contract no right to the possession of the wheat vested in the plaintiffs before the remittance by them of a banker's draft on London, and consequently, that on their failure to comply with that condition, the defendants were justified in intercepting the delivery. (4 B. & A. 948.)—*Wilmshurst v. Bowker*, 3 Scott, N. R. 272.
2. (*Right of possession of purchaser—Lien of unpaid vendor.*) The defendant agreed to sell to the plaintiff certain apples, to be taken away and paid by the latter on a given day; in the interim, the apples were deposited in a kiln within a hoast-house, the key of which kiln being delivered to the plaintiff, that of the hoast-house being retained by the defendant; the plaintiff made default, the defendant resold the apples: Held, that the plaintiff had not such possession as to entitle him to maintain trover against the defendant for re-selling before the lapse of a reasonable time. (4 B. & A. 941; 5 Bing. N. C. 541.—*Milgate v. Kibble*, 3 Scott, N. R. 358.
3. (*Right of deduction from agreed price of chattel, by reason of defects.*) Special assumpsit on a contract to build a ship according to a specification, assigning a breach in not building the ship with scantling, fastening, and planking, according to the specification, and alleging special damage. Plea, that the defendant had sued the plaintiff for the balance of the agreed price of the ship, after payment

of 3,500*l.* and also for a sum of 150*l.* for extra work, in the form of an action for work and labour, and for goods sold and delivered; that issue was joined, and, on the trial of the cause, the now plaintiff gave evidence in his defence of the same breach of contract alleged in the present declaration, and insisted, if the amount of compensation to which he was entitled exceeded or equalled the balance and value of the extra work, that he the now plaintiff was entitled to a verdict; if less, that he was entitled to a deduction, upon the amount of both, to the extent of such amount of compensation: that the judge who tried the cause so directed the jury, and the jury found that the now defendant had committed a breach of the contract, and that the now plaintiff was entitled to some compensation, which they deducted from the price of the ship and the value of the extra work: that the now defendant had judgment for the amount, after such deduction had been made, since the commencement of this suit: Held, that the plea was bad on general demurrer.

Held, also, that all that the plaintiff could by law be allowed in diminution of damages on the former trial, was a deduction from the agreed price, according to the difference between the ship as she was at the time of delivery, and what she ought to have been according to the contract; but that any claim for damages on account of the subsequent necessity for repairs could not be allowed in the former action, and might be recovered in this.

In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more.—*Mondel v. Steel*, 8 M. & W. 858.

4. (*Construction of—Evidence of inherent defects in chattel, how far admissible.*)

The plaintiffs agreed with the defendants to manufacture for them certain locomotive engines, under the following contract: "Each engine and tender to be subject to a performance of a distance of 1000 miles, with proper loads; during which trial, Messrs. S. & Co. (the plaintiffs) are to be liable to any breakage which may occur, if arising from defective materials or workmanship; but they are not to be responsible for nor liable to the repair of any breakage or damage, whether resulting from collision, neglect or mismanagement of any of the Company's servants, or any other circumstances, save and except defective materials and workmanship. The performance to which each engine is to be subjected, to take place within one month from the day on which the engine is reported ready to start; in default of which, Messrs. S. & Co. shall forthwith be released from any responsibility in respect of the said engine; the balance to be paid on the satisfactory completion of the trial, and release of Messrs. S. & Co. from further responsibility in respect of such engine." It was also agreed, that the fire boxes should be made of copper, of the thickness of 7-16ths of an inch, (and they were accordingly so made), and that the best materials and workmanship were to be used. The engines were accordingly delivered to the defendants, and performed the distance of 1000 miles within the month of trial, but nine months afterwards the fire box of one of them burst, when it was discovered that the copper had been considerably reduced in thickness: Held, in an action against the defendants for the balance due from them, that

they could not give evidence of an inherent defect in the copper (no fraud being alleged), since, by the terms of the contract, the month's trial, if satisfactory, was to release the plaintiffs from all responsibility in respect of bad materials and bad workmanship.—*Sharp v. Great Western Railway Company*, 9 M. & W. 7.

5. (*Sale of goods for ready money—Payment—Pleading.*) Where goods are sold for ready money, and payment is made accordingly, no debt arises, and such payment is therefore proveable under the general issue.—*Bussey v. Barnett*, 9 M. & W. 312.

And see PLEADING, 15.

CORPORATION.

(*Liability of, in debt, for benefit enjoyed by burgess.*) The case of *Hopkins v. Mayor of Swansea*, 4 M. & W. 621, was affirmed on error in the Exchequer Chamber. —*Mayor of Swansea v. Hopkins*, 8 M. & W. 901.

COSTS.

1. (*When taxable on lower scale.*) In an action of debt, in which the writ of summons was indorsed for 57*l.*, the defendant pleaded as to all but 19*l.* payment; as to the 19*l.* payment into Court. At the trial he proved payment to the plaintiff of all the debt beyond the 19*l.*; but it appeared that the sum of 13*l.* was paid after action brought. The verdict was thereupon entered for 13*l.*, the plaintiff undertaking to sue out execution for the costs only: Held, that the plaintiff was entitled to costs to be taxed on the scale applicable to a recovery of a sum above 20*l.*.—*Fewster v. Boggott*, 9 M. & W. 20; 1 D. P. C. (N. S.) 406.
2. (*On reference of cause after new trial granted.*) After a verdict for the plaintiff, the defendant obtained a rule for a new trial, which was made absolute, no mention being made of costs. The parties then agreed to a reference, and the order of reference stipulated that the costs were to abide the event. The arbitrator having decided the cause in favour of the defendant: Held, that the defendant was not entitled to the costs of the trial. 4 M. & W. 502.—*Thomas v. Hawkes*, 9 M. & W. 53; 1 D. P. C. (N. S.) 346.
3. (*Reviewing taxation.*) Where the master had taxed costs as between attorney and client, pursuant to the directions of an award, which directions were alleged to be an excess of authority in the arbitrator, the Court refused to direct a review of the taxation, the proper preliminary step being to move to set aside the award. —*Bartle v. Musgrave*, 1 D. P. C. (N. S.) 325.
4. (*By whom payable.*) The Court has no power (except in actions of ejectment), after verdict, to compel a person not a party to the record to pay costs, even though he be really the party interested in the cause. (10 B. & Cr. 615; 4 M. & W. 194; 8 D. P. C. 517.—*Evans v. Rees*, 1 D. P. C. (N. S.) 338.
5. (*Costs of reference—Joint attorney.*) Three actions by the same plaintiff were referred, the costs of the reference to be in the arbitrator's discretion. He awarded that each party should pay half the costs of the reference. One attorney attended for all the defendants, and the master allowed him one-third of the usual travelling expenses: Held wrong, for that he should have calculated the costs on both sides, and then have divided them.—*Day v. Norris*, 1 D. P. C. (N. S.) 353.
6. (*Taxation.*) The Court will not interfere with the master's discretion as to the allowance of the costs of an attorney for going abroad to attend a commission for the examination of witnesses.—*Cornett v. Dempsey*, 1 D. P. C. (N. S.) 422.

7. (*Security for—Prochein amy.*) Where, in an action brought on the part of an infant by his prochein amy, the latter cannot be found at the address of which he is described, the proper course is to take out a summons for a stay of proceedings until his address is given by the plaintiff's attorney, and not for a stay of proceedings until security for costs be given.—*Hayes v. Carr*, 1 D. P. C. (N. S.) 522.
8. (*Of witnesses, in issue under Tithe Commutation Act.*) An issue under the 6 & 7 Will. 4, c. 71, raised a question as to the mode of taking the tithe of calves. The plaintiff's notice of the points intended to be raised, delivered under the act, stated an intention to raise a question as to the value also. At the trial, the plaintiff was precluded, at the instance of the defendant, from going into the latter question, as not being properly raised by the issue. The defendant, having succeeded, was held not to be entitled to the costs of witnesses brought by him to rebut the plaintiff's evidence as to the value.—*Fisher v. Berrell*, 1 D. P. C. (N. S.) 565.
9. (*On setting aside judgment of non pros.*) Where an order is obtained for setting aside a regular judgment of non pros. for want of a replication, on payment of costs, that means on payment of the costs of the judgment, and of the application to set it aside: and the defendant's attorney having refused to attend a peremptory appointment for the taxation of the costs, the Master taxed them at the nominal sum of 3s. 4d., on tender of which the plaintiff was held entitled to treat the judgment as set aside, and proceed to trial.—*Christie v. Thompson*, 1 D. P. C. (N. S.) 592.

And see ARBITRATION, 5; CERTIORARI, 4; PROCESS, 1.

COURT OF EXCHEQUER.

Quære, whether the equitable jurisdiction of the Court of Exchequer in revenue causes is transferred to the Court of Chancery by the stat. 5 Vict. c. 5.—*Attorney-General v. Kingston*, 1 D. P. C. (N. S.) 450.

COURT OF REQUESTS' ACT.

(*Service of summons under.*) By the Hull Court of Requests' Act, a summons for a debt may be served by leaving it at the dwelling-house of the debtor with his servant, or other person belonging to him, and if he does not appear, the creditor may proceed ex parte to judgment and execution.

A summons was left with his wife at the house where the debtor, who was a seafaring man, and absent on a voyage to the East Indies, had lived before his departure from England, and where the wife still lived.

Held, that the summons had been duly served, and that the creditor might proceed to execution.—*Culverson v. Melton*, 4 P. & D. 445.

COVENANT. See PLEADING, 7.

COVENANT TO REPAIR.

(*Liability upon, of tenant holding under agreement for lease of copyhold premises—Condition precedent.*) By agreement dated 20th October, 1824, reciting a former agreement in 1819, for the grant of a lease of copyhold premises to A. B. for twenty-one years, from the 25th of March, 1820, and that A. B. had requested, and the plaintiff had agreed, that the defendant should be accepted as tenant, and a lease should be granted to him instead of to A. B., on the same terms; and that the plaintiff was desirous to let the premises to the defendant so soon as a good licence for that purpose should be granted to him by the lord of the manor,

but not before : the plaintiff, in consideration of the covenants and agreements thereafter contained on the part of the defendant, covenanted that he would, so soon as a good licence for that purpose should have been procured by him from the lord, at the defendant's expense, lease the premises to the defendant for all the residue then unexpired of the term of twenty-one years from the 25th of March, 1820, &c. ; and the defendant thereby covenanted, from thenceforth yearly during the remainder to come of the said term, to pay the plaintiff the rent, and also that he would *from time to time during the term to be granted as aforesaid*, keep the premises in repair, &c. &c. The agreement contained also a covenant by the plaintiff for quiet enjoyment during the remainder of the term, on payment of the rent and performance of the covenants. The defendant entered upon the premises, and occupied them until the expiration of twenty-one years from the 25th of March, 1820 : Held, that he was liable on the covenant for repair, although no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that purpose.—*Pistor v. Cater*, 9 M. & W. 315.

DEBT. See BILLS AND NOTES, 12.

DEBTOR AND CREDITOR.

(*Composition between—Liability of favoured creditor.*) The plaintiff, being insolvent, proposed to his creditors to pay them a composition of 10s. in the pound, to be secured by his acceptances. All the creditors agreed to the arrangement except the defendant, who refused to execute the agreement unless he were paid the additional sum of 2s. in the pound on his debt. A cheque for that amount was accordingly given him by a relation of the plaintiff, without the plaintiff's knowledge, and he then signed the agreement, and received from the plaintiff his acceptances for the 10s. composition. *Seemle*, that, under these circumstances, the plaintiff, if he were compelled to pay the bills at maturity to bona fide indorsees, to whom they had been transferred by the defendant for value, might recover back from the defendant the excess received by him beyond the amount of the composition. (6 M. & Sel. 160 ; 5 Bing. 432 ; 10 Ad. & E. 82.)—*Bradshaw v. Bradshaw*, 9 M. & W. 29.

DETINUE. See PLEADING, 10 ; WRIT OF TRIAL, 4.

DEVISE.

1. (*To trustees.*) The testator devised land to R. B. and W. B., upon trust, that they and their heirs should set and let the said premises, and out of the rents, in the first place, should pay off and discharge a debt of 121l. 10s. 6d., which he then owed to one of his servants, and in the next place should pay to his five nephews and nieces 10l. each as soon as the clear rents and profits of the premises would admit, and from and after the said debt due to his servant and the five legacies should be paid off and discharged, he gave, devised, and bequeathed the premises to John Blackmore in fee. At the time of the testator's death the premises were under lease to one J. P. and the trusts of the will were fully satisfied, and the debts and legacies mentioned therein duly paid by the trustees, without any other setting or letting of the premises : Held, that under this will the trustees took a chattel interest only, no greater estate being necessary to enable them to carry into effect the trust of the will. (5 East, 161.)—*Ackland v. Pring*, 3 Scott, N. R. 297.

2. (*When it passes a fee.*) Testator, after several pecuniary bequests, devised as follows :—"As to my messuages, lands, tenements, and real estate, I dispose

thereof as follows ; I give and devise to T. S. and J. S. S. and their heirs (certain messuages) upon the following trusts ; first, for the use of my wife H., and after her decease, to the use of T. M. and J. M., &c., as tenants in common :” Held, that the latter devisees took a fee.—*Knight v. Selby*, 3 Scott, N. R. 409.

DILAPIDATIONS.

(*Right of incumbent to sue for dilapidations, on exchange of livings.*) Two clergymen being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party respectively was inducted into the other of them. There was no specific agreement entered into upon the subject of dilapidations, but it was found that neither party at the time contemplated any claim for dilapidations : Held, in an action by one of the incumbents against the other, as his successor, for dilapidations, that the plaintiff was entitled to recover.—*Downes v. Craig*, 9 M. & W. 166.

DISTRESS.

(*Damage feasant—Personal custody of chattel—Pleading.*) To a plea in trespass justifying the taking of a horse, cart, and other chattels, damage feasant, it is a good replication, that the horse, cart and chattels were, at the time of the distress in the actual possession, and under the personal care of, and then being used by, the plaintiff ; and actual danger of breaking the peace need not be alleged.

So, if the declaration complain of an assault, and the plea justify on the ground that plaintiff was interfering to intercept the distress.

Rejoinder, averring that the horse, &c. were, at the time of the taking, in plaintiff’s possession, &c. for the purpose of being and were then used in doing the damage : Held bad. (Vin. Abr. 121, Distress (A), pl. 4 ; 6 T. R. 138.)—*Field v. Adames*, 12 Ad. & E. 649 ; 4 P. & D. 504 : and see *Bunch v. Kennington*, 4 P. & D. 509.

EJECTMENT.

1. (*Service.*) Service having been effected on the son of the tenant in possession on the premises, the tenant was afterwards informed of what had been done, and said “ then he had no time to lose :” Held sufficient for a rule nisi for judgment.—*Doe d. Brickfield v. Roe*, 1 D. P. C. (N. S.) 270.
2. (*Same.*) Service on a woman who represents herself as the wife of the tenant in possession, on the premises, it being sworn that her statement is believed, is sufficient for a rule absolute for judgment. (4 M. & P. 11 ; 8 D. P. C. 135.)—*Doe d. Grange v. Roe*, 1 D. P. C. (N. S.) 274.
3. (*Same.*) Service on the daughter of the tenant on the premises before the term, with an acknowledgment by her, after the commencement of the term, that she had given the declaration to her father, held sufficient for a rule nisi for judgment. Where a lodger in a house could not be met with, service on the keeper of the house, at the house, was held sufficient for a rule nisi for judgment.—*Doe d. Threader v. Roe*, 1 D. P. C. (N. S.) 261.
4. (*Production of consent rule.*) It is not necessary for the lessor of the plaintiff in ejectment to produce the consent rule as part of his case, in order to entitle him to require the defendant to confess lease, entry, and ouster ; and if the defendant appears, but refuses to confess lease, entry, and ouster, the lessor of the plaintiff is entitled to sign judgment against the casual ejector, and issue execution. (Moo. & M. 237 ; 2 B. & Adol. 948.)—*Doe d. Flemming v. Armfield*, 1 D. P. C. (N. S.) 327.

5. (*Service.*) Where the tenant has become bankrupt, service on the bankrupt, the official assignee, and the messenger in possession, is sufficient for a rule absolute for judgment, without service being also effected on the creditors' assignee. (6 D. P. C. 456.)—*Doe d. Johnson v. Roe*, 1 D. P. C. (N. S.) 493.
6. (*Same.*) Where service was effected on the mother-in-law of the tenant in possession on the premises, and the wife of the tenant, on the day before term, stated that the mother-in-law had delivered all the papers to her, the Court granted a rule nisi for judgment against the casual ejector.—*Doe d. Morgan v. Roe*, 1 D. P. C. (N. S.) 543.
7. (*Same.*) Where the service was on the tenant's servant, who stated she had given the papers to the tenant, and the tenant, on being afterwards seen, refused to make any acknowledgment, and referred the party to his attorney; the Court granted a rule nisi for judgment against the casual ejector.—*Doe d. Elderton v. Roe*, 1 D. P. C. (N. S.) 585.

And see *COGNOVIT*, 1; *WARRANT OF ATTORNEY*, 6.

ELECTION.

(*Liability of agent.*) An election agent is not liable to be sued for the services of persons employed by him in canvassing voters, without proof of an undertaking on his part to make himself personally liable for those services: but slight evidence is sufficient to show that credit was given to the agent.—*Longbottom v. Rogers*, 2 Man. & Gr. 427.

ESCAPE.

It is an indictable misdemeanor at common law to aid the escape from custody of a person confined under the remand of the Insolvent Debtors' Court.—*Reg. v. Allan*, 1 Carr. & M. 295.

EVIDENCE.

(*Proof of document coming from custody of opposite party.*) Defendant, to prove that he had been in partnership with the plaintiff, offered in evidence a written contract purporting to be made by plaintiff and defendant, as partners, with K. a builder, for work to be done by K. upon the premises where plaintiff carried on the business in which the defendant alleged himself to have been a partner. The document was in plaintiff's custody, and produced by him on notice: Held, that the contract was not admissible without proof of the execution, as an instrument under which plaintiff claimed an interest. (3 Taunt. 60; 1 C. M. & R. 782.)—*Collins v. Bayntun*, 1 Ad. & E. (N. S.) 117.

EXECUTION.

1. (*Against several defendants, after discharge of one under Insolvent Act.*) Where one of several defendants, having been arrested on a ca. sa., has been discharged under the Insolvent Debtors' Act, his goods cannot be afterwards seized under a fi. fa. issued against him and the other defendants.—*Raynes v. Jones*, 9 M. & W. 104; 1 D. P. C. (N. S.) 373.
2. (*"Expenses of execution," what are—Costs of interpleader rule.*) The costs of an interpleader rule obtained by a sheriff or other similar officer, cannot be considered as "expenses of the execution," which may be levied under the stat. 43 Geo. 3, c. 46, s. 5.—*Hammond v. Nairn*, 9 M. & W. 221; 1 D. P. C. (N. S.) 351.
3. (*Fieri facias—Assignment of term by sheriff.*) A sheriff took in execution, and sold a term of years; the judgment creditor became the purchaser, took posses-

sion, and paid rent to the reversioner, but no assignment was executed to him by the sheriff: Held, that the term remained in the debtor, and that he was entitled to recover it in ejectment.—*Doe d. Hughes v. Jones*, 1 D. P. C. (N. S.) 352.

EXECUTOR AND ADMINISTRATOR.

1. (*Right of action of administrator on contract with intestate.*) The defendant ordered a coat of one T. a tailor, the coat was cut out and tacked together, and tried on the defendant by T., but before it was finished T. died; the coat was afterwards finished and delivered by his widow and administratrix: Held, that the value of the coat was recoverable upon a count for goods sold and delivered by the administratrix. (1 C. & J. 403.)—*Werner v. Humphreys*, 3 Scott, N. R. 226.
2. (*Liability of executor on joint contract made by testator and others.*) Where several persons jointly contract for a chattel to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor that his executors shall pay his proportion of the price of the article to be furnished.—*Prior v. Hembrow*, 8 M. & W. 872.

And see ARBITRATION, 5; LEGACY; PLEADING, 7; WITNESS, 1.

EXTENT.

(*Commission to find debts—Affidavit, sufficient evidence before.*) In the case of an immediate extent, on an inquisition to find debts, the jury may find the fact of a debt being due to the crown, on the sole evidence of an affidavit that the debt is due. [Overruling *Rex v. Hornblower*, 11 Price, 29.]—*Reg. v. Ryle*, 9 M. & W. 227; 1 D. P. C. (N. S.) 431.

FALSE PRETENCES.

1. (*Pleading.*) In trespass for assaulting the plaintiff, and compelling him to go to a police office, and there preferring against him an unfounded charge of having unlawfully attempted to procure from the defendant a certain check-book, the defendant pleaded, that the plaintiff had unlawfully endeavoured to obtain from him a blank check-book, by pretending to one G. A. that he was the servant of one P. T., who kept a banking account at the defendant's house, and inducing the said G. A. to go to the defendant's house and ask for a blank check-book for the said P. T.; that the said G. A. asked for the check-book, saying he wanted it for the said P. T., and that he had been sent by the plaintiff, who was over the way; whereas in truth and in fact P. T. was not the master of the plaintiff, nor had employed or directed him to procure the said book for him; that the defendant, thereupon, having good and probable cause of suspicion, and having reason to suppose that the plaintiff had unlawfully endeavoured to obtain from him a blank check book for unlawful and unauthorized purposes, gave him into custody, &c.: Held, that the plea was bad; first, as not alleging any complete offence to have been committed by the plaintiff, within the 7 & 8 Geo. 4, c. 29, s. 53, in respect of which he was authorized under s. 63 of that act to give the plaintiff into custody; and also because it alleged no intention on the part of the plaintiff to defraud the defendant.—*Mathews v. Biddulph*, 1 D. P. C. (N. S.) 216.
2. *Semble*, that a knowingly false statement by a person to a pawnbroker, that articles brought by him to be pawned are silver, is a false pretence within the

statute, although the pawnbroker, on testing them, immediately find them not to be so. (See 8 C. & P. 848.)—*Reg. v. Ball*, 1 Carr. & M. 249; see also *Reg. v. Henderson*, id. 328.

3. (*Indictment.*) Indictment for false pretences against A. and B., charged that P. was possessed of a mare, and B. of a horse, and that A. and B. *falsely* pretended to P. that B. was possessed of a certain sum of money, to wit, 12*l.*, and that if P. would exchange his mare for B.'s horse, B. was willing and ready to purchase P.'s horse, and pay him 12*l.*; whereas in truth and in fact B. was not possessed of the sum of 12*l.*, and was not ready and willing to purchase P.'s horse, or to pay him 12*l.*: Held bad, as not showing that the defendants *knew* that B. was not possessed of 12*l.* (2 P. & D. 333.)—*Reg. v. Henderson*, 1 Carr. & M. 328.

And see AUTERPOIS ACQUIT.

FELONIOUS DEMOLISHING.

On an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for beginning to demolish, pull down, or destroy any house, &c., it must be proved, in order to a conviction, that the intention of the prisoner was so to destroy the house as in fact to leave it no house at all: and no injury, however extensive, short of the actual demolition of the very walls of the building, will satisfy the statute.—*Reg. v. Adams*, 1 Carr. & M. 299.

FORGERY.

1. (*Undertaking, warrant, or order for payment of money, what is.*) An instrument in the following terms,—“I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same: you will please have a receipt, and add the amount to invoice of order on hand,”—purporting to be addressed to a wholesale house in London by a customer in the country,—was held not to be an undertaking, a warrant, or an order, for the payment of the money, so as to be the subject of forgery.—*Reg. v. Thorn*, 1 Carr. & M. 206.
2. (*Of warrant and order for payment of money—Of receipt.*) On an indictment for forging and uttering “a warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*,” and also for forging and uttering “an acquittance and receipt for money, to wit, for 85*l.*,” it was proved that M. had paid 85*l.* into a bank, and taken an accountable receipt for that amount; that the course of dealing at the bank was to treat such receipt, with the depositor's signature upon it, as an order for the payment of the money deposited, and interest; and that the prisoner went to the bank with the receipt, wrote M.'s name on it, and delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.*, being the 85*l.* and also 2*l.* 17*s.* 6*d.* for interest: the prisoner was held to be rightly convicted.—*Reg. v. Atkinson*, 1 Carr. & M. 325.
3. (*Intent to defraud.*) H. employed L. to do work for him. L. had a partner S., who took no active part in the business, which H. knew. L. asked H. for payment, and he gave him a forged bill of exchange, knowing it to be so, which L. indorsed in his own name only, and gave it to S., who also indorsed it with his own name, and negotiated it: Held, that H. was properly indicted for uttering the bill with intent to defraud L. alone.—*Reg. v. Hanson*, 1 Carr. & M. 335.

FRAUDS, STATUTE OF.

1. (*Delivery and acceptance.*) Defendant, having bargained with plaintiff, for the purchase of wool from plaintiff at a certain price, removed it to a warehouse

used by defendant for that purpose, but belonging to a third party; there the wool was weighed and packed in sheeting of the defendant's. The course of dealing was, that the wool remained on these premises till paid for. The wool in question was not removed or paid for: Held, that there was a sufficient delivery and acceptance of the goods within statute 29 Car. 2, c. 3, s. 17, to ground an action for goods sold and delivered, though the plaintiff retained a special interest in them (not properly a lien) in respect of the understood engagement not to remove them till paid for.—*Dodsley v. Varley*, 12 Ad. & E. 632; 4 P. & D. 448.

2. (*Delivery and acceptance—Written memorandum, must be before action brought.*) The defendant ordered goods of H., the del credere agent of the plaintiff, at a stipulated price, to be paid for on delivery; and on receiving notice that the goods had arrived at H.'s warehouse, went there, and directed a boy whom he saw there to put a certain mark on the goods. On the defendant's refusal to receive the goods by reason of a dispute about the price, an action was commenced against him by the plaintiff; after which, at H.'s request, the defendant wrote in H.'s ledger, at the bottom of a page, containing the statement of the goods in question, and headed with the plaintiff's name, the words "Received the above," which he signed: Held, that there was no evidence to go to the jury of a delivery and acceptance sufficient to satisfy the Statute of Frauds. (3 B. & Ald. 680; 5 B. & Ald. 855; 10 Bing. 99.)

A memorandum in writing of a contract, to satisfy the Statute of Frauds, must have been made before action brought.—*Bill v. Bament*, 9 M. & W. 36.

GAOL. See POOR RATE, 1.

HIGHWAY.

- (*Order for stopping.*) An order of justices under stat. 55 Geo. 3, c. 68, s. 2 (see stat. 5 & 6 Will. 4, c. 50, s. 85), for stopping a highway, began with this recital "We," &c. "having viewed a certain public highway," &c., "and it appearing to us that such highway is unnecessary, we do order," &c.: Held a bad order, the words not necessarily implying that it was made "upon the view of the said justices," according to the act. (4 Ad. & E. 698.)—*Reg. v. Jones*, 12 Ad. & E. 684; 4 P. & D. 520.

HORSE RACE.

A steeple chase is a lawful horse race within the stat. 18 Geo. 2, c. 34, s. 11.—*Evans v. Pratt*, 1 D. P. C. (N. S.) 505.

INDICTMENT.

1. (*Conclusion contra formam statutorum—Demurrer.*) Where a statute declares an offence and awards a punishment, and by a subsequent statute the punishment is altered, the indictment for such offence should conclude against the form of the statutes.

A prisoner may demur and plead over to an indictment at the same time. (1 Carr. & M. 180.)—*Reg. v. Adams*, 1 Carr. & M. 299.

2. (*Quashing indictment at instance of prosecutor.*) A rule to quash an indictment for informality, at the instance of the prosecutor, is absolute in the first instance, although the indictment has been removed by the defendant into Q. B. by certiorari, he having not yet appeared and pleaded.—*Reg. v. Stowell*, 1 D. P. C. (N. S.) 320.

And see BENEFIT SOCIETY; FALSE PRETENCES, 3; PERJURY, 1; PRINCIPAL AND ACCESSORY, 1.

INFANT. See ACTION ON THE CASE, 1; COSTS, 7.

INSOLVENT.

(*Discharge of, on payment of detaining creditor's debt and costs.*) Where an order has been made by the Insolvent Court under the 37th section of the Imprisonment for Debt Act (1 & 2 Vict. c. 110), vesting the insolvent's estate in the provisional assignee, the detaining creditor is not bound to accept the amount of debt and costs tendered on behalf of the insolvent, where it does not distinctly appear that the money tendered is no part of the insolvent's estate; and the Court will not order the insolvent's discharge on affidavit of such tender and refusal.—*Drury v. Houndsfield*, 4 P. & D. 386.

And see EXECUTION, 1; WARRANT OF ATTORNEY, 1.

INSURANCE.

(*Liability of underwriters for negligence of crew.*) The case of *Dixon v. Sadler*, 5 M. & W. 405, was affirmed on error in the Exchequer Chamber.—*Sadler v. Dixon*, 8 M. & W. 895.

INTERPLEADER ACT.

(*Costs of issue.*) Where assignees set up a claim for goods taken in execution, and upon an issue under the Interpleader Act fail to sustain it, they must pay costs.—*Melville v. Smark*, 3 Scott, N. R. 357.

And see BANKRUPTCY, 2, 3; EXECUTION, 2.

JOINT-STOCK BANKING COMPANY.

1. (*Execution against.*) Where a plaintiff has recovered judgment and sued out a fruitless execution against the public officer of a banking company under 7 Geo. 4, c. 46, the Court will not give the plaintiff leave to proceed against former members by sci. fa. under the 13th section, unless it is made to appear that he has really and bonâ fide attempted to enforce the judgment against the members for the time being. (6 M. & W. 217.)—*Eardley v. Law*, 4 P. & D. 379.

2. (*Action by—Declaration.*) A declaration described the plaintiff as "one of the present public officers of certain persons united in co-partnership for the purpose of carrying on the trade and business of banking in England, according to the stat. 7 Geo. 4, c. 46: Held bad on special demurrer, for not stating that the co-partnership was carrying on the trade and business of bankers, or had carried on such trade.—*Fletcher v. Crosbie*, 9 M. & W. 252.

And see ARREST, 3.

JURY.

1. (*Exemption of Barbers' Company from serving on juries.*) The exemption from serving as jurymen, claimed by the members of the Barbers' Company, under the charters of 1 Edw. 4 and 5 Car. 1, and the statute 18 Geo. 2, c. 15, does not extend to the Central Criminal Court, but is confined to the local Courts of the city of London, viz. those holden before the mayor, the sheriffs, or the coroner.—*In re White*, 1 Carr. & M. 189.

2. (*Return of jury process.*) Since the 3 & 4 Will. 4, c. 67, s. 2, the venire facias juratores may be made returnable either on a particular day, or "forthwith."—*Drake v. Gough*, 1 D. P. C. (N. S.) 573.

And see WRIT OF TRIAL, 1.

JUSTICES OF THE PEACE. See NOTICE OF ACTION.

LANCASTER COURT OF COMMON PLEAS.

(*Execution on judgment in—Affidavit.*) On an application under the stat. 4 & 5 Will. 4, c. 62, s. 31, for leave to issue execution on a judgment in the Court of Common Pleas at Lancaster, the affidavit must state distinctly that the defendant was a resident within the jurisdiction of that Court at the time of the judgment or of action brought, and then had goods and chattels there, which he has since removed out of the jurisdiction. It is not sufficient to state that he is not now a resident in the county of Lancaster, and has not any goods or chattels within the jurisdiction; or, that he is not now a resident there, and has removed all his goods and chattels out of the jurisdiction since the judgment.

The affidavit must be intitled in the superior Court.—*Wigden v. Birt*, 9 M. & W. 50; 1 D. P. C. (N.S.) 372.

LANDLORD AND TENANT.

(*Notice to quit—Disclaimer.*) Lands were held by G. as tenant from year to year to D., who died in 1837, and devised the same to trustees for the term of 140 years, upon trust (inter alia) to permit his wife E. D. to take the rents and profits thereof during her life. G. paid the rent to E. D. the widow, after D.'s death, from 1837 to 1840, and on receiving a notice to quit from her in March, 1840, stated that he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year: Held, in an action of ejectment brought by the trustees for the recovery of the premises, that this was sufficient evidence of a disclaimer by G. of the title of the trustees, to warrant the jury in finding a verdict for the plaintiff.—*Doe d. Davies v. Evans*, 9 M. & W. 48.

LAND TAX ACTS.

(*Conveyance under, when invalid—Invalidity, when cured.*) Where tenant for life, without impeachment of waste, makes an absolute sale and conveyance of land under stat. 42 Geo. 3, c. 116, s. 51, for the purpose of redeeming the land tax on other property, the growing timber, though not mentioned in the conveyance, passes with the land, and the price of it, as well as that of the land, must be paid into the Bank of England under sect. 98, although the price of the land, without the timber, makes up the sum for which the land tax is to be redeemed. Semble, that if the price of the timber be paid by mistake to the tenant for life, and not into the Bank, the conveyance is void under stat. 42 Geo. 3, c. 116, s. 119.

But assuming this to be so, the case is within stat. 54 Geo. 3, c. 173, s. 12, and stat. 57 Geo. 3, c. 100, s. 25, and either clause will cure the defect.—*Doe d. Blewitt v. Phillips*, 1 Ad. & E. (N. S.) 84.

LARCENY.

(*Of post-office money order—Stamp.*) A post-office money order is a warrant and an order for the payment of money, within the stat. 7 & 8 Geo. 4, c. 29, s. 5: and the practice of issuing them unstamped being legalized by the stat. 3 & 4 Vict. c. 96, it is no objection, on an indictment for stealing such an instrument, that it had no stamp.—*Reg. v. Gilchrist*, 1 Carr. & M. 224.

LEGACY.

(*Assent of executor to.*) A testator bequeathed to his two sons his two carriage manufactories, with all fixtures, implements, tools, stock, job-carriages, harness, and every thing appertaining to his trade in the said manufactories. At the time of his death, a carriage was in one of the manufactories, unfinished, which was being built to the order of a purchaser. A question arose between the executors

and the sons, whether this carriage fell within the above bequest; and the executors paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt: "A disagreement arising between the sons S. and T. and the executors, as to whether the whole of this item belongs to the said sons, or part to the residue, the executors desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty, when the matter in dispute shall be determined." The sons retained possession of and finished the carriage, delivered it to the purchaser, and received the price. In an action by the executors against them for money had and received, commenced two years afterwards: Held, that there was no evidence to go to the jury of assent by the executors to the legacy of the carriage to the defendant.—*Elliott v. Elliott*, 9 M. & W. 23.

LETTER-STEALING.

1. Where, in consequence of suspicions entertained against a letter carrier in the employ of the post office, an inspector wrote a letter, and inclosed in it a marked sovereign, sealed the letter, and secretly placed it among those which the letter carrier was engaged in sorting; the sovereign being one of those which are occasionally found on the floor of the post office, having dropped out of letters, and which are carried to a fund under the direction of the postmaster-general; and the letter carrier appropriated the letter and its contents: Held, that he could not be convicted of stealing a *post letter* containing money, but that he might be convicted of the larceny of the sovereign, described in the indictment as the property of the postmaster-general.—*Reg. v. Rathbone*, 1 Car. & M. 220.
2. A servant being sent with a letter, and a penny to prepay the postage, to a receiving house, found the door shut, and therefore put the penny inside the letter, fastening it by means of a pin, and then put the letter into the unpaid letter-box. A messenger in the post office stole the letter with the penny in it: Held, that he might be convicted of stealing a *post letter* containing money, the property of the postmaster-general.—*Reg. v. Mence*, 1 Car. & M. 234.

LIBEL.

1. (*Privileged communication—Pleading—Intendment after verdict.*) In a case of libel, the declaration stated that the plaintiff was a Roman Catholic priest, and priest of a chapel named, and that defendant, intending to injure him in his said offices, published of him, in those offices, a libel, which was set out. The alleged libel contained an account of a Roman Catholic having been seen performing a penance, which was suggested to be of a degrading kind, and added, that the party performing the penance said that his priest would not administer the sacrament till he had performed it, and that his priest was the plaintiff. The declaration also set forth certain comments of the defendant, accompanying the publication, and in which the Roman Catholic discipline was attacked. The libel was not otherwise connected with the plaintiff, nor were there any allegations showing how the enjoining such penance would affect the character of a Roman Catholic priest. Judgment was arrested, the Court holding that the publication was not, on the face of it, libellous, and refusing, even upon the assumption that plaintiff was charged with imposing the penance, to intend that the jury had evidence before them of any injury to plaintiff which the declaration did not show, though some evidence to that purpose was in fact given.

Held, that if the publication had been libellous, it would not have been justifiable on the ground that it was promulgated at a public meeting called to peti-

tion parliament against making a grant in support of the Roman Catholic college.
—*Hearne v. Stowell*, 12 Ad. & E. 719.

2. (*Privileged communication*.) Defendant claimed rent of plaintiff; plaintiff's agent (with whom plaintiff had authorized defendant to correspond on the subject, refusing himself to communicate with defendant immediately) told defendant that plaintiff denied his liability; defendant thereupon wrote to the agent alleging facts in support of his claim, and adding, "this attempt to defraud me of the produce of the land is as mean as it is dishonest."

Declaration for libel, setting out the above letter: plea, not guilty.

Held, that the publication in these terms was not privileged, and that the judge was justified in directing the jury that it was a libel.—*Tuson v. Evans*, 12 Ad. & E. 733; 4 P. & D. 396.

3. (*Pleading—Innuendo—Colloquium—Demurrer to part of libel*.) A libellous paper, after alleging that the plaintiff had been in prison, and had applied for money to pay his rent, &c. &c., stated that he was a "mere man of straw." The declaration added to this allegation, the innuendo—"thereby meaning that he was insolvent and in bad circumstances." On general demurrer to this part only of the declaration, it was held that it was not necessary to explain by prefatory averment the meaning of the term "mere man of straw;" and that as the libel contained but one charge, namely, of insolvency, the defendant could not plead or demur to a part only.—*Eaton v. Johns*, 1 D. P. C. (N. S.) 602.

LIMITATION ACT.

The statute 3 & 4 Will. 4, c. 27, s. 2, does not apply to rent reserved on a demise.
—*Grant v. Ellis*, 9 M. & W. 113.

MANDAMUS.

1. (*Against whom grantable—Return*.) A mandamus issued, commanding a party who was alleged to have custody of certain books, papers, and proceedings relating to a court of requests (under a local act, 47 Geo. 3, sess. 2, c. 1), or to the clerk thereof, to deliver them up to a party who claimed to hold as having been elected clerk to the court: Held, that the mandamus was bad, as not showing that the detainer was by other than a private individual.

Although the defendant in his return alleged that he, and not the prosecutor, was duly elected clerk, and that as such clerk he was entitled to hold the books, &c., raising on the face of the return a question upon the construction of the local act, and statute 5 & 6 Will. 4, c. 76, ss. 72 and 28; yet if on the face of a mandamus there be no ground for the writ, the defect cannot be supplied by matter appearing in the return.—*Reg. v. Hopkins*, 1 Ad. & E. (N. S.) 161.

2. (*Return, when sufficient—Attachment on, against whom to be issued*.) A return stating excuse for non-compliance with a peremptory writ of mandamus is inadmissible. An attachment cannot be granted against the "mayor, aldermen and burgesses" of a borough for disobedience to peremptory writ of mandamus requiring them to pay a sum of money secured by a compensation bond under the corporation seal; but the particular individuals who have been concerned in disobeying the writ must be named in the rule for the attachment. A peremptory writ of mandamus requiring a corporation to enforce payment of existing borough rates, or to cause to be collected another rate, and out of the same to pay money due under a compensation bond, is bad, because it directs payment to be provided in a particular mode, by making or enforcing a borough rate, without showing that the existing borough fund is insufficient; and the objection may be

made as an answer to a rule for an attachment against those who have disobeyed the writ.—*Reg. v. Mayor, &c. of Poole*, 1 G. & D. 728.

3. The Court refused to issue a mandamus to the chairman of a Court of Quarter Sessions, requiring him to issue process of the apprehension of persons against whom an indictment had been found a year before at those sessions, for keeping a gaming house, an application for such process having been rejected at the sessions.—*Reg. v. Russell*, 1 D. P. C. (N. S.) 544.

And see MUNICIPAL CORPORATION ACTS, 2; ORDER OF REMOVAL, 3.

MANSLAUGHTER.

Indictment for manslaughter stated that the prisoners gave and administered to A. divers large and excessive quantities of spirits, &c., and induced, procured and persuaded him to drink them, the said quantities of spirits, &c., being likely to cause his death, which the prisoners well knew; that A. by their inducement, &c. drank the said large quantities, &c., and thereby became greatly drunk and distempered, and that while he was so the prisoners assaulted him and forced him to go, and placed and confined him in a cabriolet, and drove and carried him about for two hours, and thereby greatly shook and knocked him about; by means whereof he became mortally sick, of which large and excessive quantities of spirits, &c., and of the drunkenness occasioned thereby, and of the said shaking, &c. and the mortal sickness occasioned thereby, he died. The deceased was a man in possession for the sheriff of the goods of one of the prisoners, who plied him with liquor, and when very drunk put him into a cabriolet, and caused him to be driven about the streets; and about two hours after he had been put into the cabriolet he was found dead in it: Held, that if they did this to keep him out of possession, and by so doing accelerated his death, that was manslaughter, and they might be convicted of it under this indictment.—*Reg. v. Packard*, 1 Car. & M. 236.

MASTER AND SERVANT.

The buyer of a bullock employed a licensed drover to drive it from Smithfield.

By the bye-laws of London no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock (together with others the property of different persons) to the owner's slaughter-house. Mischief was occasioned by the bullock, through the careless driving of the boy.

Held, that the owner was not liable for the injury, the boy not being in point of law his servant; although the careless driving continued after the boy had driven the bullock beyond the bounds of the city, towards defendant's house. Per Coleridge J. The owner would not have been liable if the drover himself had been driving at the time of the injury. (5 B. & A. 547; 8 Ad. & E. 109; 6 M. & W. 499.)—*Milligan v. Wedge*, 12 Ad. & E. 737.

And see ACTION ON THE CASE, 2.

MONEY HAD AND RECEIVED.

1. (*To recover back money paid under forgetfulness of facts.*) Money paid by the plaintiff to the defendant, under a bonâ fide forgetfulness of facts which disentitled the defendant to receive it, may be recovered back in an action for money had and received.

It is not sufficient to preclude a party from recovering back money paid by him under a mistake of facts, that he had the means of knowledge of the facts; unless he paid it intentionally, not choosing to investigate the facts. (2 East, 469; 6 B. & A. 671; 1 M. & Rob. 293.)—*Kelly v. Solari*, 9 M. & W. 54.

2. An agreement was entered into between the plaintiff and the defendant, whereby the defendant sold to the plaintiff his claim on one B. in respect of certain matters in difference then awaiting the decision of an arbitrator, which was subsequently ratified by a formal deed of assignment; and the arbitrator having made an award in favour of the defendant, directing the costs of the reference to be paid between the defendant and B., and which was taken up and paid for by the plaintiff, the defendant was employed by the plaintiff to receive from B. the amount due to him under the award: Held, that the plaintiff might recover, in an action for money had and received, the amount both of the debt and costs.—*Smith v. Jones*, 1 D. P. C. (N. S.) 526.

MONEY LENT.

An I. O. U. is sufficient *prima facie* evidence in an action for money lent, though it be not addressed, and no proof be given that U. means the plaintiff, except his producing the document. (1 Man. & G. 46.)—*Douglas v. Holme*, 12 Ad. & E. 641.

MONEY PAID. See CHEQUE.

MORTGAGOR AND MORGAGEE. See APPORTIONMENT OF RENT.

MUNICIPAL CORPORATION ACTS.

1. (*Disqualification of burgess by nonpayment of rates and receipt of alms.*) Under 5 & 6 Will. 4, c. 76, s. 9, which provides that no occupier shall be on the burgess roll "unless he shall have been rated in respect of such premises so occupied by him to all rates made for the relief of the poor of the parish wherein such premises are situated, and unless he shall have paid all such rates, including therein all borough rates, if any, directed to be paid under the provisions of this act, as shall have become payable in respect of such premises," a party is not disqualified by nonpayment of rates assessed upon him under an old local paving and lighting act, the powers of which have been transferred from the statutory trustees to the corporate body, under 5 & 6 Will. 4, c. 76, s. 75.

Nor under another proviso of 5 & 6 Will. 4, c. 75, s. 9, "that no person shall be so enrolled in any year, who, within twelve calendar months next before the said last day of August shall have received parochial relief, or other alms, or any pension or charitable allowance from any fund entrusted to the charitable trustees of such borough," is included a charitable institution for the use and benefit of poor housekeepers of the city, not receiving parochial relief.—*Reg. v. Mayor of Lichfield*, 1 G. & D. 10.

2. (*Compensation to removed borough officer.*) The town council of a borough, under 5 & 6 Will. 4, c. 76, s. 66, has jurisdiction to determine the whole claim to compensation of a borough officer who has been removed from office, and may pronounce not only on the amount to which he is entitled, but whether his office, or the tenure of it, was such as to entitle him to any thing.

2. Where, therefore, the council determined that a removed borough officer had no claim to any compensation whatever, and stated, that in case their decision should be overruled, on appeal to the lords of the treasury, they reserved the right of disputing the amount of the claim: Held, that the council had not neglected to determine the claim, so as to be bound to admit it, after the lapse of six months, under 5 & 6 Will. 4, c. 76, s. 66.

3. The lords of the treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged mis-

conduct or otherwise; they have jurisdiction as to nothing but the amount of compensation.—*Reg. v. Mayor of Sandwich*, 2 G. & D. 28.

3. (*Right of election to office of clerk of Court of Requests in borough.*) By an act of Parliament creating a Court of Requests for the borough of Boston, it was enacted that the mayor, recorder, deputy recorder, alderman, and common councilmen for the time being of the borough, the justices of the peace for a certain district, together with other persons therein mentioned, should be the commissioners thereof; and that in case of a vacancy in the situation of clerk of the Court, &c., the mayor and aldermen of the borough for the time being, or the major part of them, should appoint a successor, and that until such appointment should be made, the commissioners or any three or more of them should nominate officers to do the business of the Court. At a meeting of the town council of B., specially summoned for the purpose of electing a clerk, the plaintiff, who was a member of the council, was elected by the council, and before the end of election he tendered to the mayor his resignation of the office of town councillor, together with the sum of 50*l.* as a fine on resignation, under 5 & 6 Will. 4, c. 76, s. 51. No bye-law had been made to enforce a fine on resignation, and therefore the mayor returned the 50*l.* in the presence of the council after the election. The plaintiff's seat in the council was afterwards filled by the election of another person, and at a quarterly meeting of the town council, held on the 7th May, 1840, of which no notice had been given, the plaintiff was again elected by the town council: Held, first, that neither the 73d section of 5 & 6 Will. 4, c. 76, nor the 8th section of 6 & 7 Will. 4, c. 105, was applicable to this case.

Secondly, that the case was within the 72nd section of 5 & 6 Will. 4, c. 76; the true construction of which was, that the body corporate under that act should be trustees or commissioners for executing, by the town council, the powers and provisions of all acts of Parliament, of which powers and provisions the old body corporate, or any of the members thereof, in their corporate capacity, were sole commissioners or trustees before the election of the town council; and as the mayor and aldermen were, by the local act, sole trustees or commissioners for the purpose of appointing the clerk, that their powers devolved upon the town council, and that the plaintiff was duly elected at the first meeting; that, under all the circumstances of the case, the plaintiff's resignation of the office of town councillor was sufficient; but that if it was not, his election to the office of clerk had the effect of vacating his office of town councillor.—*Staniland v. Hopkins*, 9 M. & W. 178.

And see *Quo Warranto*.

MURDER.

- (*By poison—Indictment.*) An indictment for murder, charging that the prisoner administered poison to the deceased, and that he took and swallowed it, by means of which taking and swallowing the deceased became mortally sick, and of the said mortal sickness died, is good, without stating that the deceased died of the poison.—*Reg. v. Sandys*, 1 Car. & M. 347.

NAVIGATION ACT.

- (*Construction of.*) By a local act, 1 Will. 4, c. 55, the Trent and Mersey Navigation Company were empowered to take lands for the purposes of the navigation, and by section 118 and other sections, provision was made for ascertaining by a sheriff's jury the sum to be paid for the land, and for any damage occasioned by the company in carrying the provisions of the act into effect. And in order to

protect the company from injury to arise from working any mines near two tunnels by which the canal passed under a certain hill, the act provided, by section 170, that no mine owner should work any mine in or under any land within forty yards of the tunnels without leave of the company; and by section 171, that if the company, instead of insisting on their full right of having forty yards left unworked, should require less than thirty yards to be so left, then the mine owner might insist on the necessity of leaving, for his security, any greater quantity unworked not exceeding thirty yards, and the question so in dispute as to the quantity necessary to be left for the security of the mine owners was to be tried, settled, and determined, *by an issue at law*. And by section 172 it was provided, that whenever any mine became workable in ordinary course within forty yards of the tunnels, the mine owner should give notice to the company, and thereupon the company should pay to the mine owner for so much of the mine within the forty yards as they should require to be left unworked for security of their works; or (as the case might be) for so much of the mines as, under the provisions of section 171, it might be ascertained to be necessary to leave unworked, for security of the mines. Provided, that no mines should in any case be worked under the tunnels; but whenever any such last-mentioned mines should become workable, satisfaction should be made by the company for the same, "*such satisfaction to be settled by an issue at law*."

By the 178th section, the course to be taken in trying any feigned issue was pointed out, and it enacted, that after trial and verdict in such issue, the Court was to give judgment for the sum of money to be awarded by the jury: Held that, by the express terms of the 172nd section, the owner of a mine which had become workable within the space of forty yards of the tunnels mentioned in the act, was entitled to be paid for the value of the forty yards of mine left unworked for the security of the navigation, the whole having been by the company required to be so left unworked; but that the only remedy open to him to enforce his right was by a feigned issue, and consequently that he was not entitled to proceed by an action on the case.—*Fenton v. Trent and Mersey Navigation Company*, 9 M. & W. 203.

NEW TRIAL.

(*Where damages are under 20l.*) The Court refused to grant a new trial upon affidavit disclosing matter to impeach the evidence at the trial, where the damages were less than 20l. and no fraud was imputed to the plaintiff, but only to a witness called by him.—*Branson v. Didsbury*, 12 Ad. & E. 631; 4 P. & D. 441.

NOTARIES' ACT.

Where a person, bound apprentice to a notary who also carried on the business of an attorney in the same office, three or four years before the expiration of his apprenticeship was articulated also to the same master as attorney, and served under both contracts, the Court held that service under the latter contract was not necessarily inconsistent with the complete service required by the Notaries' Act, 41 Geo. 3, c. 79, s. 7; that it was a question of fact, whether the notarial service had been *bonâ fide* performed, and, as it did not appear that the service as attorney's clerk had interfered with the service as notary's apprentice in the particular case, granted a mandamus to the Scriveners' Company to admit the apprentice a notary.—*Reg. v. Scriveners' Company*, 1 G. & D. 641.

NOTICE OF ACTION.

(*On magistrate.*) The mere act of a magistrate cannot waive the necessity of serv-

ing and proving a notice of action, under the stat. 24 Geo. 2, c. 44. Therefore, although a magistrate had sent to the plaintiff a paper writing, reciting that the notice had been served upon him, and tendering amends in respect of the matter contained therein, proof of such notice was still required.—*Martins v. Uppeher*, 1 D. P. C. (N. S.) 655.

ORDER OF FILIATION.

1. (*Construction of 4 & 5 Will. 4, c. 76, s. 73—Costs.*) By a rule of quarter sessions, it was directed that all applications intended to be made for orders of maintenance in bastardy should be entered with the clerk of the peace on or before a certain day; and that such applications should be called on at the sessions in order of entry. The overseers of a parish entered an application with the clerk of the peace, according to the above rule and the practice of the sessions, paying the usual fee on entry, and giving notice to the party against whom they applied. He attended at the sessions, and the case was called on, but the prosecutors did not appear. The sessions made no order upon the application, and ordered (under stat. 4 & 5 Will. 4, c. 76, s. 73) that the overseers should pay costs to the party appearing: *Held*, that the entry was an application, and the calling on the case and the attendance of the opposing party a hearing of such application within sect. 73, and therefore that the order for costs was rightly made.—*Regina v. Stamper*, 1 Ad. & E. (N. S.) 119.
2. (*Recognizance by putative father—Costs—Order, by whom obtainable.*) 1. Where a person charged at the petty sessions as a putative father, appears there, and under 2 & 3 Vict. c. 85, desires that the case should be heard at the quarter sessions, and enters into his recognizance to answer the charge at the latter sessions, to be held on a stated day, and to abide the judgment of that Court, and to pay all costs, it is not necessary at the hearing to prove that he has had notice for the hearing at the quarter sessions, or that he had notice originally for the petty sessions. 2. Where the quarter sessions make an order adjudging a party to be the putative father, they cannot thereby award costs against him; but if so much of the order as relates to costs can be separated, it is good for the remainder. 3. Where a bastard becomes chargeable to a parish forming part of a union, although it is not a union for the purpose of rating under the 4 & 5 Will. 4, c. 76, s. 34, either the overseers of the parish may apply for an order upon the putative father for its maintenance, or (*dubitante Coleridge, J.*) the guardians of the union.—*Regina v. Justices of Wiltshire*, 4 P. & D. 406.
3. (*Recognizance of putative father under 2 & 3 Vict. c. 85, s. 3.*) A party who appears at the petty sessions on the charge of being putative father, and desires to have his case heard at the quarter sessions, and enters into recognizance under 2 & 3 Vict. c. 85, s. 3, reciting that he had due notice to appear at the petty sessions, he is bound by that recital, and cannot afterwards on the hearing at the quarter sessions object that in fact such notice was not given.—*Regina v. Stoddart*, 1 G. & D. 654.
4. (*Form of.*) An order of quarter sessions in a bastardy case must state that the case has been transmitted from the petty sessions.—*Reg. v. Guardians of Hartley Wintney Union*, 1 G. & D. 732.

ORDER OF JUSTICES.

(*How far impeachable by affidavit, when removed by certiorari.*) When a conviction or order of justices is returned to the Court of Queen's Bench, and the proceedings are regular in form and practice, and the case one over which the jus-

tices had jurisdiction, the Court will not hear affidavits impeaching their decision on the facts; nor, if they return the evidence, will it review their judgment thereupon. The test of jurisdiction under this rule is whether or not the justices had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false. It may be shown by affidavit that they had no authority to commence an inquiry, inasmuch as the question brought before them was not one to which their jurisdiction extended, and this, although by misstatement they have made the proceedings on the face of them regular. Where an order of justices for delivering up a house to parish officers under stat. 59 Geo. 3, c. 12, ss. 24, 25, was correct in form, and made on a proper information, summons, and hearing, the Court (on certiorari) refused to inquire into the reasonableness of their judgment, either on affidavit, or on the evidence returned with the proceedings, although the act gives no appeal against such order.—*Reg. v. Bolton*, 1 Ad. & E. (N. S.) 66.

ORDER OF REMOVAL.

1. (*Statement of grounds of appeal.*) Where the grounds of appeal against an order of removal set up a subsequent settlement out of the appellants parish, they must state all the essentials of such settlement. If therefore the settlement is by hiring and service, it must be stated that the hiring was for a year.—*Reg. v. Inhabitants of North Bovey*, 1 G. & D. 701.
2. (*Statement of grounds of appeal.*) The following ground of appeal against an order of removal, "the said J. M. did in the years 1828, &c. rent and occupy for a space of twelve months and upwards a house and land in P. (the respondent township), of the yearly rent and value of 10*l.* and upwards, and did pay upwards of 10*l.* rent for the same, and did thereby gain a settlement in the said township:" Held insufficient, as the words "occupy a house and land" did not necessarily import the residence, which, as being a constituent part of the settlement, ought to have appeared on the notice.

A mandamus to the sessions to hear an appeal must be applied for promptly.—*Reg. v. Justices of West Riding*, 1 G. & D. 706.

3. (*Appeal—Right of sessions to dismiss re-entered appeal.*) A special case from sessions stated that an appeal against an order of removal had been dismissed and the order confirmed on the ground that no grounds of appeal had been given, the sessions refusing to hear or respite the appeal; that subsequently, at the same sessions, the sessions made another order, on the usual motion, permitting an appeal to be entered against the same order. (The case did not state whether the sessions knew the second entry applied to the same order as to which the appeal had been previously dismissed.) That the appeal so re-entered came on for hearing at the next sessions, when it appearing that the order appealed against was the same order, the sessions considered that the same order of removal had been absolutely confirmed by the judgment of the previous sessions, and dismissed the appeal. The question for the Court of Q. B. was, whether the sessions "were right in considering the order of removal absolutely confirmed, and in dismissing the appeal:" Held, that they had a right to dismiss the appeal.—*Reg. v. Inhabitants of Oundle*, 2 G. & D. 77.

4. (*Statement of grounds of appeal.*) Grounds of appeal stated that the appellants parish was not the last place of settlement of the pauper's father, as in the examination stated, and also that he in November, 1832, rented a house and orchard

at Ealington, in the parish, &c. from, &c. at the rent of 10*l.* a year and upwards, for, &c. "and occupied the same under such renting or hiring from that time until Michaelmas, 1836, and paid the rent for the same, and also was assessed to and paid the poor rate for the same during the whole of that time." Upon a finding of the sessions, subject to a case, that the grounds of appeal were sufficient, though residence was not stated: Held, they were not sufficient, and the Court therefore quashed the order of sessions. (1 G. & D. 706.)—*Reg. v. Inhabitants of Old Stratford*, 2 G. & D. 82.

5. (*Examination—Secondary evidence.*) An examination stated an order of removal unappealed against from the respondent to the appellant parish. It did not state that the order of removal was produced before the removing magistrates, or that any evidence was given to show that it could not be obtained: Held, that the examination was insufficient. (1 G. & D. 610.)—*Reg. v. Inhabitants of Mildenhall*, 2 G. & D. 86.
6. (*Superseding.*) An order of removal cannot be superseded so as to oust the sessions of their appellant jurisdiction, after an appeal has been entered, though that was a mere entry for the purpose of respiting, and though no notice of appeal had been given before such entry and respite, nor till after the twenty-one days following the order of removal had elapsed, and the pauper had been removed to the appellant parish. (3 P. & D. 459; 1 G. & D. 630.)—*Reg. v. Directors, &c. of Brighthelmstone*, 2 G. & D. 88.
7. (*Time for notice of appeal.*) An order of removal was made on the 22d of February; on the 26th a copy of the order and examination was received by the appellants. On the 29th of March the quarter sessions were held. No notice of appeal was given for those sessions. On the 12th of April the pauper was removed under the order. On the 28th of June the Midsummer sessions were held, at which the appellants, without notice to the respondents, entered and respited the appeal. Notice of appeal was afterwards given, on the 2d of October, for the Michaelmas sessions, which were held on the 18th: Held, that the sessions were bound to hear the appeal at those sessions. (6 Ad. & E. 894.)—*Reg. v. Justices of Cheshire*, 1 D. P. C. (N. S.) 570.

OUTLAWRY.

- (*Right of outlaw to come into Court.*) Where an outlaw has been arrested on a ca. sa. issued pursuant to a judgment more than a year old, and not duly revived by scire facias, he may apply to be discharged out of custody notwithstanding his outlawry; for the law only prevents his availing himself of the benefit of it against others, but does not prevent him from protecting his person from wrongful restraint. (1 M. & P. 126; 8 D. P. C. 506; 2 M. & W. 412; 1 Beav. 73.)—*Walker v. Thelluson*, 1 D. P. C. (N. S.) 278. So he may apply to set aside proceedings against him on a sci. fa., on the ground that a previous sci. fa. and judgment thereon have not been recited in the second sci. fa.—S. C. id. 578.

PALACE. See **POOR RATE**, 3.

PARTICULARS OF DEMAND.

- A declaration contained one count for money lent, and another for money due on an account stated. The particulars annexed to the record stated the action to be brought to recover "4*l.* 19*s.* on an account stated, and also 4*l.* 19*s.* on an account stated." The undersheriff at the trial refused to admit evidence in support of the claim for money lent, and nonsuited the plaintiff. The Court set

aside the nonsuit, it appearing that the particulars delivered with the declaration contained a claim for money lent.—*Ripper v. Walton*, 1 D. P. C. (N. S.) 344.

And see PLEADING, 1.

PARTNERSHIP.

1. (*Liability of dormant partner on written contract made by his copartners.*)—A., B., and C. being in partnership together as type-founders (C. as a dormant partner), an agreement was entered into between A. and B. of the one part, and the plaintiff of the other part, by which, after reciting that the plaintiff had been in the employment of A. and B. as foreman in carrying on the said trade of type-founders, the plaintiff covenanted and agreed with A. and B. and the survivor of them, to serve them and the survivor of them in the said trade for the term of seven years; and they covenanted and agreed to employ him as their foreman for the term of seven years, if they or either of them should so long live, and to pay him three guineas per week; and it was mutually agreed, that if either party should not perform the covenants on their respective parts, the party so failing or making default should pay to the other 500*l.* by way of specific damages. At the time the agreement was entered into, it was unknown to the plaintiff that C. was a partner in the business: Held, that an action was maintainable by the plaintiff against A., B., and C., for a breach of this agreement, although C. was not a party named in it or signing it. (Overruling *Beckham v. Knight*, 4 Bing. N. C. 243.)—*Beckham v. Drake*, 9 M. & W. 79.

2. (*Authority of partner to bind the firm by his acceptance.*) A partner has no implied authority by law to bind his copartners by his acceptance of a bill of exchange, except by an acceptance in the true style of the partnership.

Therefore, where a firm consisted of J. B. and C. H., the partnership name being "J. B." only, and C. H. accepted a bill in the name of "J. B. and Co.," it was held that J. B. was not bound thereby.—*Kirk v. Blurton*, 9 M. & W. 284.

3. (*How created.*) In May 1839, A., a creditor of the firm of B. and S., proposed to become a partner with them, the terms of the intended partnership being that A. should bring in 1000*l.* in money and 1000*l.* in goods, and should be entitled to one third of the profits, and be a dormant partner; the name of the firm was to be changed to B., S. and Co., and the partnership was to date from the 1st April, 1839, but A. reserved to himself the option of determining, at any period within twelve months from that day, whether he would become a partner. The name of the firm was altered accordingly, and a new banking account was opened in the name of B., S. and Co.; and A. advanced the 2000*l.* to the firm, but within the twelve months he declared his determination not to enter into the partnership: Held that A. was not liable for goods supplied to the firm after May, 1839, for he never became a complete partner.—*Gabriel v. Evill*, 9 M. & W. 297.

PATENT.

1. (*Specification, by whom to be construed—Construction of.*) The specification of a patent instrument called the miner's safety fuse, after describing the manner in which the case of the instrument was to be made, proceeded thus, "by means whereof I embrace in the centre of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter prepared in the usual manner of firework for the discharge of ordnance."

In an action on the case, for infringing the patent, issue was joined on a plea denying that the patentee had by his specification particularly described and

ascertained the nature of the invention, and in what manner the same was to be performed. At the trial it was objected that the plaintiff had not shown that any other material but common gunpowder had ever been used in the fuse, or if introduced would answer the purpose: Held, 1, that the question as to the sufficiency of the specification was for the jury; 2, that the language of the specification was not to be astutely construed so as to overthrow the patent, and that it was for the defendant to make out his objection clearly; 3, that the former part of the objection, that any other material but common gunpowder had ever been used in the fuse, was immaterial, because although other materials not specified, but still within the description given, would answer the purpose, no ambiguity was occasioned, nor was the difficulty of hereafter making the instrument increased, by the introduction of terms which imported that the patentee himself had ever used other materials than gunpowder in the construction of the instrument.—*Bickford v. Skewes*, 1 G. & D. 736.

2. (*Disclaimer by patentee—Pleading—Novelty.*) Under 5 & 6 Will. 4, c. 83, s. 1, the grantee of letters patent may enter a disclaimer, though at the time of doing so he has parted with a portion of his interest in the patent.

A plea to a declaration for infringing a patent, alleged that “the invention was not at the time of the making the letters-patent a new manufacture within this realm, within the true intent and meaning of the act of parliament in that case made and provided:” Held, on special demurrer, that the plea was bad for ambiguity, because it was doubtful whether the defence set up was, that the manufacture was not new, or that it was not within the statute 21 Jac. 3, s. 5.

Semble, that the plea might have been good as containing an entire defence in one connected proposition, if the words in the last mentioned section in favour of letters-patent, “of the sole working or making of any manner of new manufacture within this realm,” had been embodied in the plea.—*Spilsbury v. Clough*, 2 G. & D. 17.

3. (*Novelty.*) The “public use and exercise” of an invention, which prevents it from being considered a novelty, is a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in private; and does not mean a use by the public generally.

Therefore, where an improved lock, for which the plaintiff had a patent, had previously been used by an individual on a gate adjoining a public road for several years; and several dozens of a similar lock had been made at Birmingham from a pattern received from America, and sent abroad; it was held that this constituted such a public use and exercise of the invention as to avoid the patent. (10 B. & Cr. 22; 2 M. & W. 544.)—*Carpenter v. Smith*, 9 M. & W. 300.

PAUPER.

- (*Admission to sue after commencement of suit.*) A plaintiff may be admitted to sue in formâ pauperis after the commencement of the suit, notwithstanding the stat. 23 Hen. 8, c. 15; the Court having the power to admit plaintiffs to sue in formâ pauperis at common law, as well as by the stat. 11 Hen. 7, c. 12. (Andr. 306; Com. Dig., Formâ Pauperis (A); 3 Wils. 24; 4 M. & W. 610; 5 M. & W. 158; 7 M. & W. 189.)—*Brunt v. Wardell*, 1 D. P. C. (N. S.) 229; *Doe d. Ellis v. Owens*, id. 404.

PENAL STATUTE. See PLEADING, 20.

PERJURY.

1. (*Indictment.*) An indictment for perjury (committed in an affidavit sworn on an interpleader rule,) set out the circumstances of the previous trial, the verdict, judgment and execution, the notice by the defendant to the sheriff not to sell, and his affidavit that the goods were his property; but omitted to state that any rule was obtained under the Interpleader Act: Held bad, as it did not appear that the affidavit was made in the course of a judicial proceeding.—*Reg. v. Bishop*, 1 Carr. & M. 302.
2. (*Before commissioners of bankrupt—Authority of commissioners.*) A party cannot be convicted for perjury committed before commissioners of bankruptcy, after their adjudication, if it appear that the petitioning creditor's debt, on which the fiat issued, was not of sufficient amount; although the bankrupt owed other debts, which might have been substituted by order of the Lord Chancellor, under the stat. 6 Geo. 4, c. 16, so as to have rendered the fiat valid; no such order having been made. But *semble*, that notwithstanding the want of a good petitioning creditor's debt, the defendant might have been convicted for perjury committed before the commissioners in the course of the preliminary proceedings before the adjudication.—*Reg. v. Ewington*, 1 Carr. & M. 319.

PHYSICIAN.

- (*Right of action for fees.*) Though a contract to pay a physician cannot be implied from the mere fact of his attendance on a patient, a promise, at the end of his attendance, to pay him a fixed sum, or a reasonable compensation, will raise such a contract as will support an action. (2 Leon. 111; 11 Ad. & E. 438.)—*Veitch v. Russell*, 1 Carr. & M. 362.

PLEADING.

1. (*Plea of payment—Traverse of payment—New assignment—Particulars of demand.*) Debt in the common form for work and labour. Particular of demand for contract work and extra work. Plea, that plaintiff and defendant gave up the contract originally made between them for work, plaintiff agreeing to accept certain work, which had been done under that contract, at a reduced price; that by virtue of such agreement, defendant became indebted to the plaintiff in the amount mentioned in the declaration, and that defendant, in pursuance of that agreement, paid plaintiff, and he accepted, the said amount. Replication, traversing the payment and acceptance: Held, that on these pleadings the plaintiff could not give evidence of any demand not a subject of the second agreement; and that, to enable himself to recover for extra work, he should have new assigned. And that the particular of demand, even if it had been confined to extra work, could not aid the pleadings. (5 Bing. N. C. 553.)—*Rogers v. Custance*, 1 Ad. & E. (N. S.) 77.
2. (*Plea of payment into Court, what it admits.*) Plaintiff brought indebitatus assumpsit for work and labour, &c. as an attorney, and delivered a particular claiming 269*l.* for defending two prosecutions: defendants paid 52*l.* into Court, stating that they paid it to cover all the items previous to a certain day, and they pleaded the payment, with a denial of the damage ultra, on which issue was taken: Held, that the payment into Court admitted nothing but a liability to the amount of 52*l.*, and that, in their defence as to the residue, defendants might deny having at any time retained plaintiff as their attorney. (5 M. &

W. 94; 6 M. & W. 9.)—*Stevenson v. Corporation of Berwick*, 1 Ad. & E. (N. S.) 154.

3. (*Replication de injuriâ.*) Debt for goods sold and delivered. Plea, that the goods were sold by M., being factor of plaintiff and intrusted by him with the goods as M.'s own goods, by plaintiff's consent; and defendant did not know, and had not the means of knowing, that the goods were not M.'s; and a set-off against plaintiff of a debt due from M. to the defendant: Held, a good plea, on demurrer to the replication.

Replication, that defendant of his own wrong, and without the cause alleged, neglected to pay the debt: Held good by the Court of Queen's Bench on special demurrer. Held bad by the Court of Exchequer Chamber, reversing the judgment in B. R. 1. Because *de injuriâ* cannot be replied to a plea of set-off which operates not by way of excuse. 2, Because the plea here was, substantially, grounded on authority from the plaintiffs.—*Purchell v. Salter*, 1 Ad. & E. (N. S.) 197; 1 G. & D. 682; *Salter v. Purchell*, 1 Ad. & E. (N. S.) 209, 1 G. & D. 903.

4. (*Plea of payment—Averment under videlicet.*) Under a plea of payment, in assumpsit, averring under a videlicet that the defendant paid a certain sum in satisfaction, &c. the precise sum is immaterial, and he is only bound to prove payment of as much as will cover any demand established against him. (2 C. M. & R. 547; 5 M. & W. 109.)—*Falcon v. Benn*, 1 G. & D. 647.

5. (*Duplicity—Disqualification of attorney.*) A plea to an action by a solicitor for work and labour in divers suits, that the plaintiff was not admitted and in-rolled, nor qualified or authorized to act as solicitor at the time of the accruing of the cause of action: Held bad for duplicity, and also on the ground that the plea should have alleged the want of qualification at the time of doing the work instead of the time of the cause of the action accruing.—*Williams v. Jones*, 1 G. & D. 649.

6. (*Plea to the jurisdiction—Demurrer—Action by Railway Company for calls.*)—Where a plea is demurred to, which in form is a plea in abatement, but discloses matter that might be pleaded in bar, the defendant may object to the declaration.

The Dundalk Railway Company's act (1 Vict. cap. xcvi. s. 75,) enacts, that it shall be lawful for the directors to recover the amount of calls in any of her Majesty's Courts of record in Dublin by action of debt, and section 77 gives them a general form of declaration, that the defendant is indebted to the company for calls, whereby an action hath accrued, &c. without setting forth the special matter.

To a declaration in such form defendant pleaded, "the defendant in his own person comes and says, that this Court ought not to have cognizance of the action," &c. because it is enacted, that it shall be lawful for the company to sue for calls in any of her Majesty's Courts of Record in Dublin, and he was liable to be sued in those Courts and not elsewhere, "wherefore he prays judgment whether this Court can or will take further cognizance of the action:" Held, on demurrer to this plea, that it contained matter in bar, although it was in form a plea to the jurisdiction, and that the defendant was at liberty to impeach the declaration; and that the declaration was bad, as the remedy given by the act had not been adopted, and the company had no right at common law to declare in this form. (Lutw. 1604.)—*Dundalk Western Railway Company v. Tapster*, 1 G. & D. 657.

7. (*In covenant—Averment of vesting of term in executor.*) In covenant upon an indenture of lease against the surviving executrix of the lessee, the declaration stated, that upon the death of T. P., the lessee, all his estate and interest in the premises came to and vested in the defendant and one S. P., which said defendant and S. P. were executrices of the last will and testament of T. P.; by reason whereof the defendant and S. P., as executrices as aforesaid, became and were possessed, &c. : Held, a sufficient averment (though an unnecessary one), that the term vested in the defendant and S. P. as executrices.—*Ackland v. Pring*, 3 Scott, N. R. 297.
8. (*Traverse of immaterial averment.*) Plea to an action of covenant for rent due for turnpike tolls, that before it became due, the trustees, on &c., entered into and upon a certain part of the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof, and kept and continued him so ejected, &c., from thence hitherto. Replication, that the trustees did not enter into or upon the said part of the said tolls, or eject, &c., the defendant from the possession thereof, modo et formâ.
Held, on error in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer,) that this replication was good on special demurrer, although it put in issue not only the expulsion but also the entry, the latter being immaterial and impossible; and that the defendant having mixed up the entry and expulsion as constituting the eviction, the plaintiff had a right to follow him, and to accept the issue as tendered.—*Palmer v. Gooden*, 8 M. & W. 890.
9. (*Amendment of pleadings, time for.*) An application to the Court to amend pleadings does not fall within the rule respecting the setting aside proceedings for irregularity, with regard to the promptness of the application.—*Welsh v. Hall*, 9 M. & W. 14; 1 D. P. C. (N. S.) 365.
10. (*Non detinet, effect of.*) Under the plea of non detinet, the plaintiff is entitled to a verdict on proof that the defendant has not returned the chattel to the plaintiff on demand, having previously delivered it, under a supposed contract of sale, to a third party.—*Jones v. Dowle*, 9 M. & W. 19; 1 D. P. C. (N. S.) 391.
11. (*Plea of judgment recovered, what is.*) To an action of assumpsit for money lent, the defendant pleaded, that in an action in which the now defendant was plaintiff, and the now plaintiff was defendant, the now plaintiff set off the same debt for which the present action was brought, and in that action the now defendant obtained a verdict: Held, that this was not a plea of judgment recovered, within the meaning of the rule of H. T. 4 Will. 4, r. 8, and that the plaintiff could not sign judgment as for want of a plea.—*Brokenshir v. Monger*, 9 M. & W. 111; 1 D. P. C. (N. S.) 378.
12. (*Duplicity.*) Assumpsit on a bill of exchange drawn by one S. B. upon and accepted by the defendant, for 25*l.*, payable three months after date. Plea, that after the bill became due, and before the commencement of the suit, to wit &c., the said S. B. paid to the plaintiff divers monies, to the amount of 17*l.* and did for the plaintiff work and labour to the value of 8*l.*, in full satisfaction and discharge of the sum of money in the bill specified, and of all damages sustained by the non-payment thereof, which were then accepted and received by the plaintiff in such full satisfaction and discharge: and further, that he the defendant accepted the bill at the request and for the accommodation of the said S. B., and not otherwise, and that there never was any con-

sideration or value for the payment by the defendant of the said bill, or any part thereof, and that the plaintiff, at the time of the commencement of the suit, held and now holds the said bill without any consideration or value whatever: Held, that the plea was bad for duplicity.—*Purssord v. Peek*, 9 M. & W. 196.

13. (*Plea of coverture in abatement—Affidavit of verification—Judgment for want of plea.*) A plea in abatement to an action of debt, of the defendant's coverture, is a dilatory plea requiring an affidavit of verification under the stat. 4 Anne, c. 16, s. 11: and if there be no such affidavit, the plaintiff is entitled to sign judgment as for want of a plea, although part of the cause of action accrued after the coverture.—*Lovell v. Walker*, 9 M. & W. 299.

14. (*Effect of admission on record—Onus of proof of consideration of bill of exchange.*) Where a material fact alleged in pleading is not traversed by the subsequent pleading, it is not therefore admitted as a fact, so as to dispense with proof of it before the jury.

To a declaration in assumpsit by indorsee against maker of a promissory note, the defendant pleaded, that the note was indorsed and delivered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration; and that the plaintiff took the note with full knowledge of the premises. The plaintiff replied that he had not, when he took the note, any knowledge of the premises in the plea mentioned. Issue thereon: Held, that upon these pleadings the defendant was bound to begin at the trial, and to prove the plaintiff's knowledge of the fraud; and that the plaintiff was not bound in the first instance to prove consideration given for the indorsement to him. (2 M. & W. 642; 1 G. & D. 237.)—*Smith v. Martin*, 9 M. & W. 304; 1 D. P. C. (N. S.) 418.

15. (*Immaterial traverse.*) Declaration in assumpsit stated, that the defendants bought of the plaintiff a quantity of linseed, to be worked by the buyers out of the ship in fourteen days, the price to be paid in ready money, less 2½ per cent. discount, or by the defendants' acceptance at two months. Averments, that the linseed arrived and was ready for delivery; that the fourteen days had elapsed; and although the plaintiff tendered it to the defendants for their acceptance, and would have received their acceptance at two months for the price, and although the defendants were requested to pay in ready money, or to give their acceptance, and refused to do the latter, and discharged the plaintiff from tendering a bill for their acceptance, yet they did not accept or work the linseed, or pay for it in ready money. Pleas, first, that the defendants were not requested to pay for the linseed in ready money, or to give their acceptance; 2nd, that they did not refuse to give their acceptance, or discharge the plaintiff from tendering a bill: Held, that both pleas were bad, as traversing averments which were immaterial to the maintenance of the action.—*Spaeth v. Hure*, 9 M. & W. 326; 1 D. P. C. (N. S.) 593.

16. (*Trader—Replication of prior demand.*) Assumpsit for work and labour, money paid, and on an account stated. Plea, as to 4l. 16s., parcel, that after the making of the promises, to wit, on &c., the defendant tendered to the plaintiff 4l. 16s., and, as to that sum, he has always been ready to pay the said sum of 4l. 16s. to the plaintiff, and now brings the same into Court, &c. Replication, that before the making of the tender in the plea mentioned, and before and at the time of the demand and refusal hereinafter mentioned, a

larger sum than 4*l.* 16*s.*, to wit, 7*l.* 12*s.*, that sum including the 4*l.* 16*s.*, was due from the defendant to the plaintiff on account of divers of the causes of action in the declaration mentioned; and that before the making of the said tender, to wit, on &c., the plaintiff demanded of the defendant payment of the said sum of 7*l.* 12*s.*, so including the 4*l.* 16*s.*, yet the defendant did not pay the 7*l.* 12*s.* or any part thereof, but refused to pay the same and every part thereof, and that no set-off or other just cause then existed for the non-payment: Held, on special demurrer, that the replication was good. (7 M. & W. 147.)—*Tyler v. Bland*, 9 M. & W. 338; 1 D. P. C. (N. S.) 608.

17. (*Allegation, when to be construed disjunctively.*) In an action for a false return of nulla bona to a fi. fa. the declaration alleged, that by virtue of the writ the defendant seized and took in execution divers goods and chattels of J. R. of the value of the monies indorsed on the writ and directed to be levied, and then levied the same thereout. The defendant pleaded, that he did not seize or take in execution any goods of J. R., nor levy thereout the monies in the declaration mentioned. Issue thereon: Held, that the allegation in the plea was not to be taken disjunctively, and that the plaintiff could not recover on proof of a seizure only, without proof also of a levy of the money thereout.—*Hecnan v. Evans*, 1 D. P. C. (N. S.) 204.
18. (*Oyer.*) The defendant is not entitled, on oyer, to a copy of an indorsement made on the deed after its execution, although it may alter the effect of the deed.—*Smith v. Goldsworthy*, 1 D. P. C. (N. S.) 288.
19. (*Several counts.*) A declaration contained a special count on a charter party, from which it appeared that a certain number of days on demurrage were allowed, and a breach was assigned in detaining the vessel beyond the lay and demurrage days, but no breach in non-payment of demurrage was assigned. The Court refused to allow, with this count, a general count for demurrage.—*Temperley v. Brown*, 1 D. P. C. (N. S.) 310.
20. (*Not guilty by statute—Penal statute, what is.*) The stat. 2 W. & M. st. 1, c. 5, s. 4, (giving an action on the case for pound-breach,) is not a penal statute within the stat. 21 Jac. 1, c. 4, s. 4, so as to let the defendant into any matter of defence under the plea of not guilty by statute, other than the actual breaking of the pound.—*Castleman v. Hicks*, 1 Carr. & M. 266.
21. (*Issuable plea.*) A plea that the defendant did not accept the bill of exchange in the declaration mentioned, nor did the plaintiff give any greater value for the said bill than the sum of 10*l.*, is not an issuable plea. (8 T. R. 71.)—*Myers v. Lazarus*, 1 D. P. C. (N. S.) 316.
22. (*Traverse of facts not alleged—Traverse, when too large.*) In trespass qu. cl. freg., the defendant justified as servant of G. B., whose title was deduced. Replication, that the close was demised to the plaintiff by the defendant as agent of G. B. Rejoinder, that G. B. did not demise the close to the plaintiff: Held good on general demurrer.—*Wilkins v. Boucher*, 1 D. P. C. (N. S.) 478.
23. (*Several pleas.*) In trespass qu. cl. freg., the defendant was allowed to plead the following pleas: 1. Not guilty; 2. Not possessed; 3. A plea that T. was seised in fee, and demised to B., who demised to H., who became bankrupt, and that defendants entered as assignees of H.; 4. A like plea, but stating that H. mortgaged to R., and continued in possession as tenant of R., and that

- defendants entered as assignees of H., who had become bankrupt; 5. A like plea, but stating that H. and R., to defraud the creditors of H., demised to the plaintiff.—*Pym v. Gracbrook*, 1 D. P. C. (N. S.) 489.
24. (*Same.*) To assumpsit for money paid, the defendant pleaded, first, that she was an alien, and that she requested the plaintiff to purchase an estate for her benefit; that he bought the estate, and paid the money in his own name, in order to enable her to have the benefit of it, but had himself retained possession of it; 2, that the money was paid in furtherance of an illegal agreement to contravene the Alien Act: Held, that these pleas raised distinct matters of defence.—*Bulley v. Cathrey*, 1 D. P. C. (N. S.) 456.
25. (*Duplicity—Negative pregnant—Traverse, when sufficient.*) The plaintiff declared in assumpsit as public officer of a banking company, and the declaration contained seventeen counts on various bills of exchange accepted by the defendant. The defendant pleaded, that by an indenture made between the defendant of the first part, J. M., therein described to be the manager of the banking company, and W. B., of the second part, and certain other creditors of the defendant of the third part, the defendant assigned to J. M. and W. B. all his effects upon trust for the benefit of his creditors; and in consideration of such assignment, the said creditors thereby released him from all demands, &c.; and that the said J. M., so being such manager, executed the said indenture as such manager, for and on behalf of the company, and being duly authorized in that behalf, and which execution by him as such manager had since been duly ratified by the company, &c. Replication, that J. M. did not execute the indenture as such manager for and on behalf of the company, nor was he at any time authorized in that behalf, modo et formâ: Held, on special demurrer, first, that the replication was not bad for duplicity, being a denial of several matters which constituted but one defence; secondly, that it could not be also objected to as involving a negative pregnant; and thirdly, that in traversing the authority of J. M., it traversed the fact alleged in the plea, that his execution of the deed was ratified by the company.—*Bell v. Tuckett*, 1 D. P. C. (N. S.) 458.
26. (*Frivolous demurrer.*) A rule for setting aside a demurrer to any pleading as frivolous should be drawn up on reading that pleading.—*Danieli v. Lewis*, 1 D. P. C. (N. S.) 542.
27. (*Trover—Evidence under not possessed.*) Under the plea of not possessed, in trover, the defendant may give evidence of a right to seize the goods under a claim of toll for landing them on a particular wharf.—*Webb v. Tripp*, 1 D. P. C. (N. S.) 589.
28. (*Plea puis darrein continuance, when pleadable.*) A plea puis darrein continuance may be pleaded at nisi prius, even after the jury are sworn. And *semble*, that where the subject matter of the plea arises in the presence of the judge at nisi prius, an affidavit that the matter arose within eight days is unnecessary.—*Todd v. Emily*, 1 D. P. C. (N. S.) 596.
29. (*Replication de injuriâ.*) In assumpsit by the assignees of the fourth indorsee against the first indorsee of a foreign bill of exchange, the defendant pleaded, that after the indorsement to the third indorsee, and before the indorsement to the plaintiff, the bill was refused acceptance and was protested, and that the defendant had not notice of the non-acceptance and protest, and

that the indorsees had notice. Replication, *de injuriâ*: Held good on special demurrer. (9 D. P. C. 213.)—*Whitehead v. Walker*, 1 D. P. C. (N. S.) 600.

And see AMENDMENT; ARBITRATION, 7; BILLS AND NOTES, 9, 10, 12; BOND, 4; CONTRACT OF SALE, 3, 5; DISTRESS; FALSE PRETENCES, 1; LIBEL, 1, 3; PATENT, 2; PRESCRIPTION; TRESPASS; VARIANCE.

POOR. See SEPULTURE.

POOR LAWS' AMENDMENT ACT.

1. (*Information for misapplication of parish monies.*) An information against a parish officer for misapplying the monies, &c. of the parish, under 4 & 5 Will. 4, c. 75, s. 97, must state that he misapplied them "wilfully."—*Carpenter v. Mason*, 12 Ad. & E. 629; 4 P. & D. 439.
2. (*Authority of commissioners—Appointment of chaplain to union workhouse.*) The poor law commissioners may order the guardians of a union to appoint a chaplain for the union workhouse with a salary, such chaplain being an officer within the meaning of the 4 & 5 Will. 4, c. 76, s. 46, interpreted by sect. 109. It is no objection to such order that by a previous order, not expressly altered or rescinded, the commissioners have ordered the guardians to appoint such chaplain if they shall deem it necessary, and have specified his duties in case it shall be deemed necessary to appoint him.—*Reg. v. Guardians of the Poor of Braintree Union*, 1 Ad. & E. (N. S.) 130.
3. (*Power of board of guardians where their number is not complete.*) Under stat. 4 & 5 Will. 4, c. 76, ss. 26, 38, the poor law commissioners formed a union of six townships, comprehending T. and L., and ordered that there should be eighteen guardians of the union, two of whom were to be elected by L. and the other sixteen by the other townships, in specified proportions, there not being less than two for any one township. The first and two subsequent annual elections took place, at each of which more than six guardians were elected for the union, but L. elected none on any occasion: Held, that the board of guardians elected on the third election, though their number was not complete, might, under sect. 38, make an order on the overseer of T. for payment of money, conformable to the regulations issued for the union by the commissioners; and a mandamus went to compel the overseer to pay.
 Semble, that the board of guardians elected on the first election might have acted though their number was not complete.—*Reg. v. Overseers of Todmorden*, 1 Ad. & E. (N. S.) 185.

POOR RATE.

1. (*On quoter and turnkeys of house of correction.*) The governor of the West Riding House of Correction was assessed to the poor for a house and garden within and parcel of the prison. The house consisted of ten apartments, nine in the governor's occupation, the tenth used as a committee-room for the magistrates. The governor was obliged by the prison rules to live always within the prison walls, and nothing more was provided for him than was necessary for his convenient accommodation. The garden was half an acre in extent, containing fruit, flowers, and a greenhouse, and was chiefly used by the governor (the magistrates permitting), but was not specially appropriated to his use, the object of such an area being the health of the prisoners. The governor used it as a pleasure garden, and for his family: Held, that he was not rateable for the house and garden. The matrons and turnkeys occupied dwell-

lings within the walls distinct from that of the governor. These persons were obliged for the purposes of the establishment to sleep always within the walls. The accommodation was no more than was necessary for the object for which they were placed in the prison: Held, that they were not rateable for their dwellings.

Held also, that the justices of the riding were not rateable for the porter's lodge, &c. and the treadmill and the work rooms within the prison, where works were done by the prisoners partly for the use of the gaol and partly for hire, the earnings being carried to the public account.—*Reg. v. Shepperd*, 1 Ad. & E. (N. S.) 170.

2. (*Publication of.*) Where a parish has several districts, each having its own chapel, and separately maintaining its own poor, notice on the chapel door of that district alone for which the poor rate is made is sufficient publication within the 1 Will. 4, c. 45, s. 2.—*Reg. v. Justices of Worcestershire*, 4 P. & D. 440.

3. (*Rateability of occupiers of apartments in palace.*) Hampton Court Palace has not been personally occupied by the sovereign for about 100 years. It contains state apartments in which there is a collection of pictures, the property of the Crown, and open to public inspection; a guard of honour is always on duty at the palace, and divine service is regularly performed therein by a chaplain appointed by the Crown; sentinels are posted at the various entrances to the palace grounds, and those entrances are opened and closed at the pleasure of the Crown. The housekeeper is the only servant of the Crown who resides in the palace; several apartments are occupied by private individuals, but not as annexed to any office under the Crown, or in discharge of any service to the Crown. These apartments are assigned by the warrant of the Lord Chamberlain, directing the housekeeper to deliver the keys of certain apartments to such persons as by favour of the Crown are allowed to occupy them. Some part of the occupier's family is required by the warrant to reside a part of every year, but no specific term or interest is granted by the warrant. Previously to such persons taking possession, the apartments are put into repair, if necessary, at the expense of the Crown; afterwards the occupiers themselves have to repair, but all repairs are done under the direction of the Crown officers. Many of the apartments so occupied communicate with the state apartments; the doors of communication are kept locked during such occupation; but if in the general care of the palace the housekeeper finds it necessary to open those doors, she exercises the power of doing so, and of passing through apartments so occupied.

Held, that the occupiers of such apartments had such an exclusive occupation as to render them liable to the poor rate. (1 T. R. 338.)—*Reg. v. Ponsonby*, 1 G. & D. 713.

And see *RATLWAY*.

POUND-BREACH. See *PLEADING*, 20.

PRACTICE.

1. (*Staying proceedings, jurisdiction of judge as to.*) A judge at chambers has no power, without the consent of the plaintiff, to make an order for staying the proceedings on payment of the debt and costs at a future day.—*Norton v. Fisher*, 3 Scott, N. R. 293.

2. (*Judgment as in case of nonsuit—Peremptory undertaking given by husband and wife.*) Where in an action by husband and wife, in right of the wife as executrix, a peremptory undertaking was given to try at a specified time; and the husband afterwards died: Held, that the undertaking was not binding on the wife.—*Lee v. Armstrong*, 9 M. & W. 14; 1 D. P. C. (N. S.) 390.
3. (*Order under 1 & 2 Vict. c. 110, s. 14, jurisdiction of Court as to.*) A judge at chambers only, and not the Court, has authority, under the stat. 1 & 2 Vict. c. 110, s. 14, to make an order to charge a fund with the payment of money recovered by a judgment: if he makes an absolute order, the Court has jurisdiction to set it aside if wrongly made; but if he only makes an order nisi, the Court has no authority to entertain the question, although the judge expresses his desire to refer it to the Court.—*Brown v. Bamford*, 9 M. & W. 42; 1 D. P. C. (N. S.) 42.
4. (*Issue on nul tiel record—Rule to produce record.*) Where, on an issue on nul tiel record, the record is to be produced by the defendant, a four day side-bar rule to produce it is necessary, and a notice to the defendant to produce it is not sufficient. (3 D. P. C. 502.)—*Swinburn v. Taylor*, 9 M. & W. 43; 1 D. P. C. (N. S.) 349.
5. (*Judgment as in case of nonsuit—Drawing up rule for peremptory undertaking.*) Where a rule nisi for judgment, as in case of a nonsuit, is discharged on a peremptory undertaking, either party may draw up the rule containing the undertaking, and if the defendant does so, he must serve the plaintiff with it, to enable him to try according to the undertaking; and where the plaintiff gave a peremptory undertaking to try at the sittings after term, and on default a rule absolute was obtained for judgment as in case of a nonsuit; the Court set aside that rule and all proceedings thereon for irregularity, the defendant not having served the plaintiff with the rule containing the undertaking until the first day of the sittings. (1 Man. & G. 50.)—*Sawyer v. Thompson*, 9 M. & W. 248; 1 D. P. C. (N. S.) 449.
6. (*Setting aside judge's order.*) Where a judge's order has been made a rule of Court, a motion to set aside the order is irregular; it should be directed against the rule.—*Clement v. Weaver*, 1 D. P. C. (N. S.) 193.
7. (*Notice of writ of inquiry.*) In an action by the public officer of a banking company for the balance of an account, interlocutory judgment having been signed for want of a plea in H. T. 1839, the Court, in M. T. 1841, allowed notice of executing a writ of inquiry to be served at the defendant's last place of abode, and by sticking it up in the Master's office; it being sworn that the defendant had gone to Australia in March, 1839, to avoid payment of his debts.—*Probin v. Locoek*, 1 D. P. C. (N. S.) 197.
8. (*Irregularity in notice of declaration—Waiver.*) Where the writ was in an action "on promises," and the declaration was also "on promises," but the notice of declaration was "in debt," and the defendant took the declaration out of the office, that was held to be a waiver of the objection. (1 D. P. C. 153, 378.)—*Heywood v. Farrer*, 1 D. P. C. (N. S.) 256.
9. (*Reviewing decision of judge at chambers.*) Where a judge had made an order at chambers, founded on facts then stated to him, the Court refused, on an application to rescind the order, to allow additional facts to be shown, which were within the knowledge of the party when the order was made.—*Alexander v. Porter*, 1 D. P. C. (N. S.) 299.

10. (*Setting aside proceedings for irregularity, time for.*) Notice of declaration was served on Saturday, October 30 : Held too late to move to set it aside on the 4th November, though the defendant's attorney was out of town in the interval, and the affidavit in support of the application was sworn on the 3d November. (4 D. P. C. 283.)—*Hinton v. Stevens*, 1 D. P. C. (N. S.) 303.
11. (*Discharging rule for new trial.*) Where a rule absolute for a new trial on payment of costs was granted, but the costs were not paid within a reasonable time, after several demands, the Court made a rule absolute in the first instance for discharging the rule for a new trial.—*Champion v. Griffiths*, 1 D. P. C. (N. S.) 319.
12. (*Long vacation—Signing judgment for want of plea.*) Where the time for pleading expires *before* the 10th August, the plaintiff may sign judgment for want of a plea at any time between the 10th August and 24th October, notwithstanding the rule of M. T. 3 Will. 4 ; but when the time expires *on* the 10th August, he cannot sign judgment until the expiration of the limited time for pleading after the 24th October.—*Morris v. Hancock*, 1 D. P. C. (N. S.) 320.
13. (*Service of rule.*) Service of a rule to compute on the keeper of an inn where the defendant and his family were residing, held sufficient.—*Gosling v. Best*, 1 D. P. C. (N. S.) 333.
14. (*Consolidating actions.*) The Court consolidated two actions between the same parties on different bills of exchange, after issue joined and notice of trial given, on payment of all costs of the second action.—*Booth v. Payne*, 1 D. P. C. (N. S.) 348.
15. (*Service of rule.*) An affidavit of service of a rule to compute, on a defendant who was a publican, by leaving the rule with "a person in the bar," held insufficient.—*Monroe v. Reader*, 1 D. P. C. (N. S.) 564.
16. (*Same.*) Service of a rule to compute, by leaving a copy at the defendant's residence, with one H., who promised to deliver it to the defendant, held insufficient.—*Taylor v. Whitworth*, 1 D. P. C. (N. S.) 600.
17. Practice as to the form of entering rules to plead.—*Davis v. Edmeades*, 1 D. P. C. (N. S.) 423.
18. (*Judgment as in case of nonsuit.*) In an action for libel, an affidavit of the plaintiff, that he believed it to be unsafe to proceed to trial (in a town cause) in consequence of a strong feeling of prejudice excited in the public mind by reason of certain disclosures made by a bankrupt while under examination, and in reference to which the libel was published, was held to be no answer to a rule for judgment as in case of a nonsuit.—*Cook v. Brookes*, 1 D. P. C. (N. S.) 504.
19. (*Same.*) Where the affidavit in answer to a rule for judgment as in case of a nonsuit, stated that the parties had met and settled the action (without the knowledge of the defendant's attorney), on the terms that each party should pay his own costs ; and the defendant denied that he had instructed his attorney to make the application ; the Court discharged the rule, but directed that the costs should be costs in the cause.—*Payne v. Haredale*, 1 D. P. C. (N. S.) 525.
20. (*Filing affidavits on enlarged rule.*) The Court refused to dispense with the order for filing affidavits, on an enlarged rule, a week before the term, upon the ground of a mistake of a clerk in the country, except with the defendant's consent.—*Cosby v. Betts*, 1 D. P. C. (N. S.) 503.

PRESCRIPTION.

(*To enter upon land for mining purposes—Pleading.*) To a declaration in trespass for breaking and entering the plaintiff's closes, digging mines, and carrying away minerals, and damaging the surface soil, the defendant pleaded a plea justifying under a prescription in the name of the crown, in right of the Duchy of Lancaster, to enter upon the land for the purpose of mining, doing no more damage than was necessary for that purpose; and also a plea setting up the same right, subject to the payment of compensation, and alleging a tender of such compensation. At the trial, the plaintiff's property in the surface soil, and the crown's right to enter and mine, were proved; but there was no evidence to show any right of entry in the crown, except subject to the payment of compensation. The jury found that a sufficient compensation had been tendered: Held, that the plaintiff was entitled to the verdict on the first plea, the prescription being entire. —*Paddock v. Forrester*, 1 D. P. C. (N. S.) 527.

PRINCIPAL AND ACCESSORY.

1. (*Indictment against accessory for substantive felony.*) An indictment stated that A. B. feloniously, &c., cast away and destroyed a vessel, and that C. D. feloniously incited, moved, aided, counselled, hired, and commanded A. B. the said felony to do and commit, &c.: Held, that C. D. might be convicted on this indictment, although A. B. had not been tried, and was not amenable to justice.—*Reg. v. Wallace*, 1 Carr. & M. 200.
2. A servant let a person into his master's house in the afternoon, and concealed him there all night, in order that he might rob the house; and on the following morning left the premises in pursuance of the previous arrangement. In his absence the other party stole the master's money in the house: Held, that the servant was properly charged as an accessory before the fact to this larceny, and not as a principal.—*Reg. v. Tuckwell*, 1 Carr. & M. 216.

And see **CENTRAL CRIMINAL COURT.**

PRINCIPAL AND AGENT.

(*Liability of agent on contract signed by him.*) In an action on a written agreement, purporting on the face of it to be made by the defendant and subscribed by him, for the sale and delivery by him of goods above the value of 10*l.*, it is not competent for the defendant to discharge himself on an issue on the plea of non-assumpsit, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time the agreement was made and signed. (6 Ad. & E. 486; 2 M. & W. 440.)—*Higgins v. Senior*, 8 M. & W. 834.

PRISONER.

(*Discharge under 48 Geo. 3, c. 123—Notice of application.*) Notice of application, for the purpose of obtaining a rule absolute in the first instance for the discharge of a defendant under the 48 Geo. 3, c. 123, pursuant to the rule of H. T. 2 Will. 4, s. 90, must be given ten days before the day first mentioned in the notice, and if it be not, it cannot be rendered sufficient by waiting ten actual days from the service before the application is made.

The service of a rule nisi for such discharge must be on the plaintiff, not on his attorney; and if there be several plaintiffs, service on one of them is sufficient.—*Bolton v. Allen*, 1 D. P. C. 309.

PROCESS.

1. Costs of attendances to serve the writ of summons,—*Tapping v. Greenway*, 9 M. & W. 224; 1 D. P. C. (N. S.) 408.
2. (*Attachment for non-return of writ issued in vacation.*) The rule of M. T., 3 Will. 4, r. 13, applies only to the case of writs issued *and returnable in vacation*; in the case of a *fi. fa.* issued in vacation, but returnable, under a judge's order obtained in vacation, on a day in term, the plaintiff must still pursue the old practice, and cannot bring the sheriff into contempt after the writ has been actually returned, although after the day on which it was returnable.—*Williamson v. Harrison*, 9 M. & W. 225.
3. (*Distringas.*) The affidavit in support of a motion for a *distringas* to compel appearance, must not only state the attempts to effect service at the defendant's residence, but must state where the residence is. (1 C. & J. 147; 2 C. & J. 45; 1 D. P. C. (N. S.) 167.)—*Bradbee v. Gustard*, 1 D. P. C. (N. S.) 291.
4. (*Distringas—Peer.*) A *distringas* to compel appearance may issue against a peer, under the 2 Will. 4, c. 39, s. 3.—*Davis v. Earl of Lichfield*, 1 D. P. C. (N. S.) 363.
5. (*Amendment of capias.*) The defendant having been remanded by the Insolvent Debtors' Court, under the 1 & 2 Vict. c. 110, was arrested under sect. 35 of that act. In the affidavit of debt, the plaintiff was described as "W. B., jun.;" in the *capias*, the word "jun." was omitted. The plaintiff's father bore the same names, and resided at the same place, as the son. The Court permitted the writ to be amended, on payment by the plaintiff of the costs of the application for the defendant's discharge.—*Bilton v. Clapperton*, 1 D. P. C. (N. S.) 387.
6. (*Variance between writ and declaration.*) The writ of summons described the plaintiff as "F., executor," not stating that he sued "as executor." The declaration was general, without such description: Held, no variance. (5 East, 150; 1 D. P. C. 97.)—*Free v. White*, 1 D. P. C. (N. S.) 586.
7. (*Amendment of capias.*) A judge made an order for the arrest of the defendant for 422l. The *capias* was indorsed for 422l. 13s. 4d. (the real amount of the debt). The Court refused to discharge the defendant out of custody, and directed the writ to be amended, on payment by the plaintiff of the costs of the application for the defendant's discharge.—*Plock v. Pacheco*, 9 M. & W. 342; 1 D. P. C. (N. S.) 380.

QUO WARRANTO.

- (*Relator, who qualified to be.*) Held, that a town councillor was disqualified to be a relator, on a motion for a *quo warranto* to question the validity of the election of another town councillor, he having been conusant of the objection before the election, been present at the election, and having afterwards administered to him, without protest, the declaration required by statute 5 & 6 Will. 4, c. 76, s. 50. (1 East, 46.)—*Reg. v. Greene*, 2 G. & D. 24.

RAILWAY.

- (*Assessment of poor rate.*) The amount on which a railway, when the railway company themselves are the carriers, is to be assessed to the poor rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company for the conveyance of passengers, cattle, and goods under the powers of their acts, such lessee finding locomotive power, carriages, &c., and paying all expenses incidental to work-

ing the railway, free of all usual tenants' rates and taxes, and tithe commutation rent charge, and making allowance and deductions for average annual cost of repairs, insurance, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent. And this principle applies, though the railway act contains clauses, that if themselves are the carriers, they shall keep an estimate or account of the tolls which would be payable on the same amount of traffic supposing it to be conducted by other parties, and that they shall, under heavy penalties, allow the parish officers to have access to such account or estimate.

With regard to the rating in a particular parish, the line is to be rated, not in proportion which the length of the line therein bears to the whole line, but in the proportion that the receipts in such parish for traffic bear to the receipts throughout the whole line.—*Reg. v. London and South-Western Railway Company*, 2 G. & D. 49.

RAILWAY ACT.

1. (*Construction of—Mortgage of tolls.*) By sect. 75 of 11 Geo. 4, c. 51, the St. Helen's Railway Company's Acts, the company "may assign and charge the property of the undertaking, and the rates and tolls," as a security for money borrowed under the act, and a form of mortgage is there given, assigning to "A. B., his executors, administrators, and assigns, the said undertaking, and all and singular the rates and tolls, and all the estate, right, title, and interest of, in, and to the same:" Held, that a mortgage in the prescribed form did not pass any of the company's lands. (3 Bing. N. C. 433.)—*Dos d. Myatt v. St. Helen's and Runcorn Gap Railway Company*, 1 G. & D. 663.

2. (*Construction of—Right to lower street.*) By sect. 9 of the Eastern Counties Railway Company Act, they are empowered to raise or lower any ways, the more conveniently to carry the same over or under the railway. By sect. 100, where any bridge is erected across any public carriage road, not being a turnpike road, there is to be a clear height from the surface of the carriage road, to the centre of the arch of the bridge, not less than sixteen feet. By sect. 120, nothing in the act is to derogate any of the rights or privileges of any parish over which the railway shall pass, acting under any local act: Held, that the railway having been carried over a street by means of a bridge, which, for the convenience of the railway levels, left a space from the arch of the bridge to the street below of fifteen feet one inch only, the company had a right to lower the street in order to give the height required by the statute, notwithstanding that the street was under control of commissioners by a local act, (12 Geo. 3, c. 38,) which enacted that "no person shall alter the form of any pavements which shall be now made by virtue of this act, without the consent of the commissioners, or in any ways encroach thereon, or put up any posts, boards, &c."—*Reg. v. Eastern Counties Railway Company*, 2 G. & D. 1.

And see PLEADING, 6.

RAILWAY COMPANY.

(*Liability of, for negligently firing stack.*) In an action on the case against a railway company, the declaration alleged that the defendants, by their servants, so negligently and improperly managed and directed their steam engine, and the fire and igneous matter contained therein, that through the carelessness, negligence, and improper conduct of the defendants, by their servants, divers sparks of fire, &c. passed and flew from the said engine to, into, and upon a

stack of beans of the plaintiff, in a field adjoining the railway, near to which the engine was then passing, and the same became ignited, and was wholly burnt and consumed. Plea, not guilty. In a case stated for the opinion of the Court under the 3 & 4 Will. 4, c. 42, s. 25, it was stated that the stack was eleven yards from the rails of the railway, that the engines and boilers of the defendants were of the ordinary description, and that they were used at the time of the occurrence in question in the ordinary manner: the Court held, that there was evidence for the decision of a jury with regard to the carelessness and negligence imputed to the defendants, and that upon the facts stated the defendants were not entitled to a nonsuit.—*Aldridge v. Great Western Railway Company*, 1 D. P. C. (N. S.) 247.

RECEIVER.

(*Under mortgage deed, duties of.*) By an indenture made between one K., the plaintiffs, and the defendant, by which K. mortgaged to the plaintiffs the Kingston Rectory estate, consisting of a great number of small holdings, and tithes, many of which were taken in kind, it was agreed that the defendant, an attorney practising in London, should be appointed receiver, with the usual powers. The deed then provided for the application of the rents, &c. as follows: viz. that the defendant should "in the first place pay all the costs, charges, and expenses which he should bear, sustain, incur, or be liable to, in, or about the collecting and receiving, and compelling payment of the said rents, &c., including therein all expenses of suit, action, process, distress, and all other charges of management whatsoever;" it then provided that the interest of the mortgages should be paid, and that the defendant should pay over to K. the residue of the rents, &c., after answering the purposes aforesaid, and deducting and detaining out of such residue for his own use "so much and such sums of money as he should reasonably deserve as a compensation for his care and pains, and trouble and expense, in collecting, receiving, and paying the said rents, &c. in manner and for the purposes aforesaid, not exceeding 1s. in the pound on the gross amount of the said rents, &c. for the time being, received or collected." Held, that the receiver was entitled to repay himself such sums as were reasonably expended by him in the collection of the rents, (including a salary or per centage paid to a collector,) before applying the rents, &c. to the satisfaction of arrears of interest due upon the mortgages.—*Gilbert v. Dyneley*, 3 Scott, N. R. 364.

RECEIVING STOLEN GOODS.

A. stole an article from his master, which was taken from him in his master's presence, and then given back to him, in order that he might sell it to B., to whom he had before been in the habit of selling similar stolen articles. A. accordingly sold it to B.; and B., being indicted for receiving it knowing it to have been stolen, was convicted and sentenced.—*Reg. v. Lyons*, 1 Carr. & M. 217.

REPLEVIN BOND.

It is no breach of a replevin bond conditioned to appear at the next county court, and "then and there to prosecute the suit with effect," that the plaintiff has been removed by re. fa. lo., and that after the removal the suit abated by the death of the plaintiff in replevin. (Carth. 519).—*Morris v. Matthews*, 1 G. & D. 677.

SACRILEGE.

The vestry is part of the church, within an indictment for sacrilegiously breaking and entering the church.—*Reg. v. Evans*, 1 Carr. & M. 298.

SCIRE FACIAS.

A scire facias issued on a judgment should recite a previous scire facias on the same judgment, and judgment signed thereon, although the previous scire facias has not been returned and filed. (1 King. 133.)—*Walker v. Thelluson*, 1 D. P. C. (N.S.) 578.

SEPULTURE.

(Of pauper.) Overseers are not bound by common law, or the 43 Eliz. c. 2, to bury a pauper settled in their parish, who dies in the parish, but not in any parish house.—*Reg. v. Stewart*, 4 P. & D. 349.

SESSIONS.

(Form of case from.) The Court of Q. B. refused to hear a case sent up by the quarter sessions, which concluded thus, "if the Court of Queen's Bench shall be of opinion, &c. then the order to be confirmed, but if the Court shall be of a contrary opinion, then the appeal shall stand respited until next sessions after the judgment of the Court," because the sessions had at the same time asked this Court to decide the case, and had reserved the power of afterwards deciding it themselves.—*Reg. v. Inhabitants of Wistow*, 1 G. & D. 681.

And see ORDER OF REMOVAL, 3, 6.

SETTLEMENT.

1. (By renting.) M. being tenant of premises from year to year on a hiring from Martinmas, at 10*l.* rent, payable half-yearly, gave them up to pauper in January, 1831, and the landlord agreed to accept him as yearly tenant from Martinmas to Martinmas, on the above terms, if pauper would be answerable for the current half-year's rent. Pauper agreed, and occupied accordingly, from January, 1831, to October, 1832. At May, 1831, he paid 5*l.* rent for the preceding half-year; and at Martinmas the next half-year's rent of 5*l.* In October, 1832, pauper gave up the premises to R. No rent had been paid since Martinmas, 1831. Pauper agreed with R., that R. should take his furniture and fixtures at 9*l.* 5*s.*, and in consideration thereof pay the landlord the rent due from Martinmas, 1831. The landlord agreed with pauper and R. to accept R. as his tenant, and received an undertaking from R. to pay the rent as above stated. At Martinmas, 1833, no rent having been paid, the landlord distrained, and sold the goods seized, which produced enough to pay the whole rent. Among them was part of the furniture, &c. left by the pauper, to the value of 5*l.*, but there was no specific account of the sum produced by these articles.

Held, that the pauper did not gain a settlement by renting a tenement, under stat. 1 Will. 4, c. 18, s. 1; for that he was not, during the entire half-year from Martinmas, 1830, to May, 1831, the person hiring the premises; and the rent due in respect of his occupation from Martinmas, 1831, was not paid by him. (4 Ad. & E. 612.)—*Reg. v. Inhabitants of Melsomby*, 12 Ad. & E. 687; 4 P. & D. 515.

2. (By birth—Child of Irish parents.) An English-born emancipated child of Irish parents, who have no settlement, is not removable with his parents, under the statutes for passing Scotch and Irish paupers. (3 B. & Ald. 410.)—*Reg. v. Inhabitants of Preston*, 4 P. & D. 509.

3. (By birth, in township not having separate overseers.) In 1828, the pauper was born a bastard in one of the several townships in a parish which had only one set of overseers for the common maintenance of its poor. Subsequently each of the

townships had its own set of overseers for the separate maintenance of its poor : Held, that the pauper had not gained a settlement in the township of his birth, so as to be removable thereto from a foreign parish. (4 Ad. & E. 167 ; 2 B. & Ald. 162.)—*Reg. v. Inhabitants of Tipton*, 2 G. & D. 92.

SHERIFF.

(*Returning fi. fa.—Special bailiff.*) To an action on debt for 5*l.* 15*s.* 1*d.*, the defendant pleaded nunquam indebitatus as to all but 3*l.* 10*s.*, and as to that sum a tender ; the verdict was entered on the postea as a general verdict for 5*l.* 15*s.* 1*d.*, and though apprised of the informality, the plaintiffs signed judgment, and taxed their costs. The Court allowed the postea to be amended, after writ of error brought, on payment of the costs as well of the application as of the writ of error.—*Harding v. Holder*, 3 Scott, N. R. 293.

And see ATTACHMENT, 1, 3, 4.

SHIP.

(*Right of owners of ship to maintain trover for cargo.*) As against a wrongdoer, the owner of a ship is primâ facie owner of the goods on board. H. and F., the owners of a ship, sent her to Charleston, where a cargo of cotton was put on board, with which she returned to this country. On her arrival here, the defendant, as mortgagee of the ship, took possession of the ship and cargo : Held, that the assignees of H. and F., who had become bankrupt before the arrival of the vessel, were entitled to maintain trover against the defendant for the cargo.—*Brancker v. Molyneux*, 3 Scott, N. R. 332.

And see BURNING SHIPS.

SMUGGLING.

(*Jurisdiction of justices under 4 & 5 Will. 4, c. 13—Warrant of commitment.*) Stat. 3 & 4 Will. 4, c. 53, enacts, that any subject of the king found within a certain distance from the coast of the United Kingdom, &c. on board any vessel from which part of the cargo has been thrown overboard to prevent seizure, shall forfeit 100*l.* ; and any officer of the customs, &c. may carry him before any justice of the peace in the United Kingdom, to be dealt with as after directed. Forfeitures may be recovered before any two or more justices of the peace in the United Kingdom. Every offence against the act committed, or forfeiture for breach of the act incurred, upon the high seas, shall for the purpose of prosecution be deemed to have been committed or incurred at the place on land in the United Kingdom, &c. into which the person shall be taken, or in which he shall be found ; and the justices of the peace for such place shall have jurisdiction. Any two or more justices before whom any person liable to be detained, and who shall have been detained for any offence against the act, shall be brought, may on confession and proof convict. Stat. 4 & 5 Will. 4, c. 13, repeals so much of the stat. 3 & 4 Will. 4, c. 53, as “imposes certain pecuniary penalties for any of the offences hereinafter next mentioned,” and then enacts, that any subject of the king discovered to have been within the distances mentioned in the former act, on board any vessel from which part of the cargo has been thrown overboard to prevent seizure, &c. “shall, upon being duly convicted of any of the said offences before any two justices of the peace,” be imprisoned for a term mentioned ; and that all informations and convictions before justices of the peace, and warrants of justices founded on such convictions, shall be drawn in the form or to the effect in the schedule annexed to the act. The form of warrant in the schedule states that the party has been duly convicted before two justices, “in and for _____, of having [state the offence as in the information],” without further setting out the jurisdiction.

A warrant under stat. 4 & 5 Will. 4, c. 13, set forth that P. had been duly convicted before two justices in and for the county of Kent, for that he, being a subject, &c. was found on the high seas within, &c. of the coast of the United Kingdom, to wit, on the coast of the county of Kent, on board a vessel from which part of the cargo had been then and there thrown overboard to prevent seizure, and that P. was by such conviction adjudged by the justices to be imprisoned, &c. On habeas corpus the warrant alone was returned. The prisoner was discharged; because, 1. The warrant ought to show a good conviction.

2. The justices could have jurisdiction only by the offence being committed on the high seas, and the offender found in or brought to Kent, stat. 4 & 5 Will. 4, c. 13, not creating a new offence, or altering the jurisdiction, but only changing the punishment, and the words "any two justices" being applicable only to justices having jurisdiction by the common law, or under the statute.

3. The conviction, as stated in the warrant, did not show jurisdiction, and was therefore bad.—*In re Peerless*, 1 Ad. & E. (N. S.) 143.

SPECIAL JURY.

In an action of replevin, the cause being set down for trial on the 19th January, and notice of trial given accordingly, the defendant, on the 11th January, obtained a rule for a special jury, which he did not serve till the 15th. The Court discharged that rule.—*Phelps v. Kirby*, 1 D. P. C. (N. S.) 501.

STAMP.

1. (*Agreement stamp, when necessary.*) In assumpsit on a contract to re-deliver, on request, wine which had been placed in defendant's care, plaintiffs offered in evidence a writing signed by defendant (a wine merchant) in substance as follows:—"This is to certify that M." (defendant) "has in his cellar belonging to H. (under whom plaintiffs claimed) that is paid for, twelve dozen of port wine," &c. "March 5th, 1823. Received from H. five bottles of port," &c. "All the above wine was paid for." Held, that such writing was admissible without a stamp, not being an "agreement or any minute or memorandum of agreement," or "evidence of a contract," within stat. 55 Geo. 3, c. 134, sched. part i, tit. Agreement. (7 B. & C. 639.)—*Blackwell v. M'Naughton*, 1 Ad. & E. (N. S.) 127.
 2. (*On bill of exchange—Blank acceptance.*) The defendant put his name as acceptor upon a blank bill stamp, before the passing of the 3 & 4 Will. 4, c. 97, by which new stamps were substituted for those previously in use. After the day appointed for that act to come into operation, the other particulars requisite to constitute the paper a bill of exchange were added: Held, that it was not a perfect bill at the time the acceptance was written upon it, and therefore that the old stamp was insufficient. (1 M. & Sel. 87; 5 B. & Ald. 674.)—*Abrams v. Skinner*, 4 P. & D. 358.
 3. In an action of assumpsit to recover a stake of 100*l.* due on a horse race, a paper was put in evidence on which were written two agreements, one of which had been fulfilled, the other being that whereon the action was brought. The document bore one agreement stamp: Held, that the stamp must be taken to apply to the latter agreement.—*Evans v. Pratt*, 1 D. P. C. (N. S.) 505.
 4. (*Agreement stamp.*) An agreement to let premises for six months at a sum of 10*l.*, does not require a stamp.—*Marlow v. Thompson*, 1 D. P. C. (N. S.) 575.
- And see LARCENY; TRESPASS, 1.

STATUTE.

(*Construction of.*) By a local act, for raising the sum of 21,000*l.* to pay the amount of damages recovered of the hundred of B. for the partial destruction of Nottingham Castle by rioters, the justices of the peace for the county of N. were empowered to borrow the required sum by mortgage, or a sale of annuities, secured on the proportion of the county rate chargeable on the inhabitants of the hundred of B. And by sect. 5, the justices were required to charge the proportion of the county rate to be raised upon the inhabitants of the hundred (except as thereafter mentioned) not only with the interest of the money borrowed, but also with the payment of such further sum as should insure the payment of the sum borrowed within seven years, or with the payment of such annuities for the like period, as should be agreed to be paid or granted in respect of any part of the money so borrowed; and such sums should be assessed and recovered on the hundred in such manner as county rates are directed to be assessed and recovered; and should be paid and applied under the direction of the justices in discharge of the interest, and so many of the principal sums secured, or of such annuities, as such money would extend to discharge in each year, until the whole of the money should be paid. The 8th sect. provided a method for each parish to exempt itself from the operation of the act, by paying its proportionate quota in the first instance, and for that purpose directed the justices, after ascertaining the amount of the sum to be borrowed, to specify and declare the sum to be paid or contributed by each parish as the proportionate quota or share of the whole sum so ascertained; and also to appoint a day on or before which the churchwardens or overseers of the poor of any such parish, desirous of paying the full amount of its proportionate quota, might pay the same to the person appointed as receiver under the act; and upon payment thereof, such parish should be discharged from all future payments relating to the integral sum whereof such quota should have been so paid, and from the interest thereof, and also from any share of the expenses, &c. And the 9th sect. enabled the churchwardens and overseers in every such parish, to raise the sum required as the quota of such parish, by loan on the security of their parochial rates, to be repaid within seven years.

In pursuance of the 8th sect., the justices fixed the quota of each parish in the hundred. Four availed themselves of the option of paying their quota. The parish of R., and thirty more, did not; and the justices raised the required sum, after allowing for these payments, by granting annuities of 3600*l.* per annum for seven years.

Held, that the effect of the 8th and 9th sections was to exempt from the operation of the 5th section those parishes only who paid their ascertained quota; that the annuities granted by the justices to pay the remainder were to be secured upon the portion of the county rate raised upon the hundred of B., with the exception of those parishes which had paid; and that the county rate, with those exceptions, was liable in the aggregate to the incumbrance, which was to be raised, in addition to the ordinary county rate, by order of the justices, in the same way in all respects as the other county rate is levied.—*Walker v. Sherwin*, 9 M. & W. 266.

TENDER. See PLEADING, 16.

TIME, COMPUTATION OF. See ARBITRATION, 17; WARRANT OF ATTORNEY, 2.

TITHE COMMUTATION ACT.

1. (*Power of commissioners to entertain successive claims for different moduses.*)

Where a claim of a modus or other exemption from tithe is preferred before the tithe commissioners appointed under 6 & 7 Will. 4, c. 71, who decide against the claim set up, the party is not precluded from setting up a claim to a different modus on the same lands, unless the commissioners have made their final award under the act; even though a feigned issue, delivered under the 46th section, be pending to try the validity of the first modus.—*Barker v. Tithe Commissioners*, 9 M. & W. 129.

2. (*Expenses incident to apportionment, what are.*) Expenses incurred by the employment of an attorney by the landowners of a parish, to conduct the proceedings towards a commutation of the tithes of the parish, under the stat. 6 & 7 Will. 4, c. 71, are not "expenses of or incident to making the apportionment," within the 75th section of that act: and the attorney may therefore recover the amount of his bill for such services, in an action against the landowners who were parties to employing him.—*Hinchliffe v. Armitstead*, 9 M. & W. 155.

And see Costs, 8.

TOLLS.

(*Construction of canal act with respect to.*) A navigation act (7 Geo. 3, c. 96) imposed a toll on "every ton of butter or other goods, wares, merchandizes, and commodities," and a lower toll on "every ton of coals, cinders, lime, and limestone, stone, gravel, and manure." Blocks, cut with wedges from the quarry, and there reduced to certain dimensions according to order, and squared with a pickaxe, to be used as railway sleepers, each being after such preparation worth ninepence more than unwrought stone of the same weight, were held liable to the toll as stones only, not as merchandize.—*Fisher v. Lee*, 12 Ad. & E. 622; 4 G. & D. 447.

TRAVERSE.

(*Fees of.*) A defendant bound by recognizance to appear and try his traverse, cannot, by surrendering to the officer, avoid the payment of the fees customary on the entering of a traverse.—*Reg. v. Bishop*, 1 Car. & M. 302.

TRESPASS.

1. (*What possession necessary to maintain—Stamp.*) The trustees of a free school drew up rules for the government of the school, prescribing also the terms upon which the master should hold or be dismissed from his office. These were signed by the trustees and by the master, who was already in office, and were produced by the trustees on the trial of a cause between them and the master (then dismissed), as "rules agreed upon at a meeting of the trustees, held," &c.: Held, that they were admissible without having been stamped as an agreement.

The master had possession of the school-room for the purposes of his office, but was summarily dismissed by the trustees for an alleged breach of the rules, and gave up the room, which was taken possession of by them and locked up. He returned on the next day, broke open the room, and held it for eleven days; at the end of which time the trustees forcibly ejected him. He then brought trespass, describing the premises as "a room of the plaintiff." Plea, denying that it was the room of the plaintiff: Held, that the plaintiff had not, by his re-entry, a *prima facie* right of possession against the trustees as wrong-doers,

and that they might set up the above facts in defence, under the plea of "not possessed." (2 Bing. N. C. 98.)—*Browne v. Dawson*, 12 Ad. & E. 623; 4 P. & D. 355.

2. (*Right of imprisonment for breach of the peace.*) In an action for false imprisonment, the plea stated that the plaintiff committed a breach of the peace by violently knocking for a long time at the door of defendant's dwelling-house, and that the plaintiff threatened to continue such knocking until a certain book was delivered up to him; that the defendant then sent for a constable, and the plaintiff having ascertained this, ceased knocking and ran off, when the defendant, with the assistance of the constable, immediately pursued and overtook him near the dwelling-house, whereupon the defendant, in order to preserve the peace and prevent the plaintiff from continuing the disturbance, gave him in charge to the constable, &c. &c.

Held, that the plea was bad, non obstante veredicto, as it did not show either that the breach of the peace was continuing, or any certain facts from which a renewal of the breach was to be apprehended. (1 Moo. C. C. 207; 1 C., M. & R. 757; 1 M. & W. 516.)—*Baynes v. Brewster*, 1 G. & D. 669.

And see PLEADING, 22, 23.

TROVER.

(*Issue in, divisible—Costs.*) In trover for waggons, wheel-barrows, iron rails, &c. &c., a verdict was given for the plaintiffs at the trial for 1850*l.*, but afterwards, on the argument of a special case, was reduced by consent to 600*l.*, and the following rule was drawn up: "It is ordered, by consent, that the verdict found for the plaintiffs on the trial of this cause be reduced to the sum of 600*l.*, and that as to the residue of the claim, the verdict be entered for the defendants:" Held, that this was the proper course, the issue being divisible, and that the plaintiffs were not entitled to have the verdict entered generally for them, but the defendants were entitled to a verdict, and to their costs, as to so much of the cause of action as they had succeeded on.—*Williams v. Great Western Railway Company*, 8 M. & W. 856.

And see PLEADING, 27.

VAGRANT ACT.

(*Commitment under.*) A commitment under the 5 Geo. 4, c. 83, s. 4, set forth that the defendant, on &c. at &c. "did go about and endeavour to procure charitable contributions, under a false pretence of being able to abstain from food for a period of five years and six months, and for which offence the said B. C. is ordered to be committed, &c. to be kept to hard labour for the space of three calendar months:" Held bad. (8 T. R. 26.)—*Reg. v. Cavanagh*, 1 D. P. C. (N. S.) 546.

VARIANCE.

Declaration stated, that by written agreement plaintiff agreed to let and defendant to take the farm of L. at a certain yearly rent, and plaintiff undertook to put the premises in repair within twelve months, after which time defendant undertook to keep them repaired. Averment that plaintiff repaired within twelve months, and demised to defendant on the terms aforesaid, and he became tenant and occupied, but did not keep in repair. Pleas, 1, non assumpsit; 2, that defendant did not become tenant or occupy on the terms in the declaration mentioned.

The agreement produced at the trial was to let and take as above; that the plaintiff should keep the buildings insured in 600*l.* (defendant repaying the

premiums) and rebuild in case of fire; and the plaintiff should repair within twelve months, and defendant afterwards keep in repair as above stated.

Held, that the variance between the contract declared upon, and that proved, was a ground of nonsuit.—*Beech v. White*, 12 Ad. & E. 668; 4 P. & D. 399.

VENDOR AND PURCHASER.

(*Agreement to deliver abstract of title.*) In an action against a purchaser of a leasehold at an auction for not completing, the declaration averred that the vendor had delivered an abstract of title pursuant to the conditions of sale, which averment the defendant traversed by his plea: Held, that the allegation was not sustained by proof that the vendor caused the lease and assignment, which composed the whole title, to be handed to the purchaser for perusal, and offered to send them to his attorney to enable him to prepare the necessary assignment.—*Horne v. Wingfield*, 3 Scott, N. R. 340.

VENUE.

1. (*Changing on special grounds.*) In an action against a banker in the north of England, the Court made absolute (on terms) a rule to change the venue from London to Northumberland or Cumberland, upon a suggestion that the bringing the bank books to London would occasion great inconvenience.—*Attwood v. Ridley*, 3 Scott, N. R. 319.
2. Where an order for time to plead was made by consent, and the defendant consented that a reservation of his right to move to change the venue should be struck out of the order, the Court refused to grant a rule to restore that reservation, but left the defendant to wait till issue joined, to make a special application to change the venue.—*Keynes v. Keynes*, 1 D. P. C. (N. S.) 287.

VOLUNTARY OATHS.

The defendant, a county magistrate, complained to the bishop of the diocese of the conduct of some of his clergy, and in order to substantiate the charge, swore witnesses before himself as magistrate, to the truth of the facts: Held, that the matter before the bishop was not a judicial proceeding, and therefore that this was an unlawful administering of a voluntary oath, within the stat. 5 & 6 Will. 4, c. 62, s. 13.—*Reg. v. Nott*, 1 Car. & M. 288.

WARRANT OF ATTORNEY.

1. (*Entering judgment nunc pro tunc—Insolvent.*) Where an insolvent debtor, before his discharge, had given a warrant of attorney to enter up judgment against him in the name of the provisional assignee, under 7 Geo. 4, c. 57, s. 57 (see stat. 1 & 2 Vict. c. 110, s. 87): Held, that, after the insolvent's death, neither the Insolvent Debtors' Court nor the Court of Q. B. could under that clause order judgment to be entered up of a term after the insolvent's death.

And the Court refused to grant a rule nisi for entering judgment, nunc pro tunc, of a term previous to his death; although assets had not accrued till after the death, and though the Insolvent Debtors' Court had made an order for execution on the judgment, but suspended it, that the opinion of the superior Court might be taken on the validity of such judgment.—*Harden v. Forsyth*, 1 Ad. & E. (N. S.) 177.

2. (*Time for filing, how to be computed.*) Sect. 1 of stat. 3 Geo. 4, c. 39, enacts "that warrants of attorney to confess judgment shall be filed within twenty-one days after the execution." Sect. 2 enacts that unless they be "filed as aforesaid within the said space of twenty-one days from the execution," or unless judgment be signed or execution issued within the same period, they, and the

judgment and execution thereon, shall be fraudulent and void against the assignees of the party giving the warrant, if he become bankrupt "after the expiration of twenty-one days next after" execution of the warrant: Held, that the twenty-one days for filing are to be reckoned exclusively of the day of execution, and that a warrant executed on the 9th December, and filed on the 30th December, was in time. (5 T. R. 283.)—*Williams v. Burgess*, 12 Ad. & E. 635; 4 P. & D. 442.

3. (*Judgment on old warrant of attorney.*) In order to obtain judgment on an old warrant of attorney, which has been filed pursuant to 3 Geo. 4, c. 39, ss. 1 and 2, it is sufficient to prove the execution by an office copy of the affidavit of execution. (4 D. P. C. 599.)—*Bland v. Wilson*, 1 D. P. C. (N. S.) 260.
4. (*Same.*) Where a defendant was seen alive in England on the 26th August, the Court, on the 10th November, granted a rule *nisi* for judgment on a warrant of attorney above ten years old.—*Hawke v. Harris*, 1 D. P. C. (N. S.) 261.
5. (*Same.*) In the case of a warrant of attorney, joint only, and not joint and several, when it is sought to enter up judgment against one of the defendants, the affidavit must show that *both* are alive.—*Lot v. Anderson*, 1 D. P. C. (N. S.) 305.
6. (*Attestation.*) A warrant of attorney to confess judgment in *ejectment* is not within the stat. 1 & 2 Vict. c. 110, s. 9, that not being a personal action.—*Doe d. Kingston v. Kingston*, 1 D. P. C. (N. S.) 266.
7. (*Defeasance.*) The defeasance to a warrant of attorney authorized execution to be issued by a surety against his principal, for the whole amount of certain bills to which the surety had become an accommodation party. It was held no objection to an execution for the whole amount, that only one of the bills had become due.—*Duke v. Watchorn*, 1 D. P. C. (N. S.) 265.

WITNESS.

1. (*Competency of next of kin, in action against administrator.*) In an action against an administrator for taking the plaintiff's goods, to which he pleaded that they were his goods as administrator: Held, that one of the next of kin of the intestate was a competent witness for the defendant, without a release.

Quere, whether a release by *two* of the next of kin to the administrator, of their respective interests in the goods, the subject of the action, required more than one stamp?

Such a release (if necessary) would have been sufficient, without extending also to the costs of the action; inasmuch as they would not necessarily be allowed to the administrator as a charge on the estate, in case of a verdict for the plaintiff.—*Thomas v. Bird*, 9 M. & W. 68.

2. (*Competency of co-contractor.*) In an action against one of several joint contractors, the other co-contractors are competent witnesses for the defendant, since the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27. (2 Scott, N. R. 574.)—*Poole v. Palmer*, 9 M. & W. 71.
3. (*Subpœna—Attendance of witness—Attachment.*) The plaintiff being under a peremptory undertaking to try at the first sittings in Michaelmas Term, the cause stood in the list for the 10th November, but was not reached on that day. On the 11th it was called on second, when the plaintiff, by reason of the absence of a witness who had been subpoenaed to prove the defendant's signature to an I. O. U. on which the action was brought, withdrew the record. In answer to a motion for an attachment against the witness, he swore that he was in Court at 11 o'clock, soon after the cause had been called on; that he had only been

subpoenaed to prove the defendant's handwriting, and that another witness also subpoenaed, who was in Court in due time, was ready to give evidence when called, and knew the defendant's handwriting. The Court discharged the rule without costs.

A subpoena required the attendance of the witness in Westminster Hall; the nisi prius sittings being held, during term, in a detached building called the Westminster Sessions House, but notices being affixed to the walls of the Court in Westminster Hall, directing witnesses to proceed to the Sessions House: on motion for an attachment, this apparent inconsistency in the writ was held to be no objection.—*Chapman v. Davis*, 1 D. P. C. (N. S.) 239.

WRIT OF ERROR.

The Court has no power to set aside the allowance of a writ of error. (10 Moore, 617.—*Borsman v. Brown*, 1 D. P. C. (N. S.) 283.

WRIT OF INQUIRY.

In debt on an administration bond, judgment by default having been suffered, and breaches assigned pursuant to 8 & 9 Will. 3, c. 11, s. 8, the Court allowed the writ of inquiry to be executed before the chief justice, notwithstanding the 3 & 4 Will. 4, c. 42, s. 16; but only granted a rule nisi in the first instance.—*Archbishop of Canterbury v. Burlington*, 1 D. P. C. (N. S.) 285.

And see **BILLS AND NOTES**, 3; **PRACTICE**, 7.

WRIT OF TRIAL.

1. (*Notice of trial—Jury.*) A writ of trial was directed to the recorder of a borough, directing him to summon a jury of the borough, duly qualified according to law: Held regular, and that it was not necessary, under the statute 3 & 4 Will. 4, c. 42, s. 17, that the jury should be taken from the county.

A notice of trial in an inferior court of record is insufficient, unless it specify the day of trial. Such defect is waived by the defendant's taking out a summons to set aside the notice, and insisting, on the hearing of the summons, on a different objection only, which is overruled by the judge.—*Farmer v. Mountfort*, 9 M. & W. 100; 1 D. P. C. (N. S.) 366.

2. (*Amendment of informalities in.*) Where the issue and writ of trial were informal in the following respects:—1, That the date of the writ of summons did not appear in the writ of trial; 2, that the issue did not recite any writ of summons or award of venire; 3, that the award of venire, in the writ of trial, stated the debt to be above 20*l.*; 4, that the writ of trial bore no date; and 5, that it did not recite when and out of what Court it issued: the defendant having appeared at the trial without objection, and a verdict having been found for the plaintiff, the Court refused to set aside the proceedings, but directed that the writ of trial should be amended, the plaintiff paying the costs of the amendment and of the application to set aside the proceedings. (3 M. & W. 169.)—*Emery v. Howard*, 9 M. & W. 108; 1 D. P. C. (N. S.) 426.

3. (*Setting aside proceedings for irregularity in issue.*) Where the date of the writ of summons, and the recital of the writ itself, were omitted in the issue, but the writ of trial was correct in these particulars, and the defendant at the trial protested against the irregularity, and refused to take any part in the proceedings; a rule afterwards obtained to set aside the issue and all subsequent proceedings was discharged with costs, on the ground that the defendant ought to have returned the issue when delivered, or applied before the trial to set it aside,

(9 D. P. C. 523; 3 M. & W. 169.)—*Coose v. Neumagen*, 9 M. & W. 290; 1 D. P. C. (N. S.) 429.

4. (*What cases triable under—Setting aside proceedings—Sheriff's notes.*) The plaintiff declared in detinue, stating the value of the chattel to be 20l.: Held, that the case was triable before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17.

Where an objection is raised that the case is not triable before the sheriff, the form of motion is not for a new trial, but to set aside the writ of trial and all subsequent proceedings.

On showing cause against a rule for a new trial, in a cause tried before the sheriff, the party must take an office copy of the sheriff's notes, as well as of the affidavits on which the rule was obtained.—*Walker v. Needham*, 1 D. P. C. (N. S.) 220.

5. (*New trial—Staying proceedings.*) After the time has expired for moving for a new trial on a writ of trial, a judge has no power to stay the plaintiff's proceedings, in order to enable the defendant to move for a new trial.—*Price v. Trenchard*, 1 D. P. C. (N. S.) 298.
6. (*What cases triable under.*) Declaration stated, that in consideration that the plaintiff, at the request of the defendant, would let to hire to him a certain carriage and chains, the defendant promised to return the same; but that although the defendant had returned the carriage, he had wholly neglected and refused to send back the chains, to the plaintiff's damage of 5l.: Held to be a claim for unliquidated damages, and not triable before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17. (5 M. & W. 155.)—*Collis v. Groom*, 1 D. P. C. (N. S.) 496.
7. (*Same.*) Where the claim of the plaintiff is for unliquidated damages, the fact of his particulars stating the amount of the damages to be under 20l. will not render the case triable before the sheriff. And although the order for trying such a cause had been obtained by the plaintiff, the Court, after verdict for the defendant, set aside the writ and subsequent proceedings at the instance of the plaintiff.—*Lismore v. Beadle*, 1 D. P. C. (N. S.) 566.
8. (*Time for execution of writ.*) Where the sheriff began the proceedings under a writ of trial on the return-day of the writ, and the trial having occupied all the day, the jury retired at a few minutes before twelve at night to consider their verdict, but did not return with it until after twelve, and no objection was made until after the delivery of the verdict, the Court refused to set aside the verdict and sheriff's return.—*Petier v. Booth*, 1 D. P. C. (N. S.) 545.
9. (*New trial—Notes of barrister.*) An application for a new trial in a cause tried before the sheriff, cannot be founded on the notes of a barrister who attended the trial, he not being the barrister who makes the motion, and the sheriff's notes not being produced.—*Reynolds v. Stone*, 1 D. P. C. (N. S.) 578.

EQUITY.

[Containing Cases in 3 Beavan, Part 2 ; 11 Simons, Part 1; and
1 Hare, Part 2.]

ADMINISTRATION OF ASSETS.

1. (*Administration of Assets.*) Payment of interest on a legacy beginning six years after the testator's death and continued for seven years: Held, to be a conclusive admission of assets.—*Attorney General v. Chapman*, B. 255.
2. (*Bankrupt executor—Costs of assignees.*) The assignees of a bankrupt executor are not entitled to be paid out of testator's estate their costs of a suit for administering that estate, unless a charge is made against them, which fails, of having received some of the assets.—*Massey v. Moss*, 319.
3. (*Debtor made executor—Evidence of debt.*) In a suit filed by the residuary legatees of A. against parties who were both the representatives of A. and of B. a debtor of A., the debt from B. to A. not being distinctly admitted by the answer, the Court admitted evidence of the debt, and allowed such evidence to be entered in the decree, but made that decree for an account only, against the defendants as representatives both of A. and B., referring it to the master to take an account of the debt.
The cases of *Law v. Hunter*, 1 Russ. 100; *Hornby v. Hunter*, Id. 107; *Walker v. Woodward*, Id. 89, observed upon—*Tomlin v. Tomlin*, H. 236.
4. (*Devise for payment of debts—Breaches of covenant by testator.*) Held, that under a devise for payment of debts, lands were liable, in default of the personal estate, to make good damages recovered against the executor for breaches of covenants in a lease, committed both before and after the death of the testator; but that, not having been a party to the action, the devisee was entitled to an inquiry as to the amount of costs, damages, and expenses incurred by the executor in the action.—*Willson v. Leonard*, B. 373.
5. (*Heir and devisee.*) In a creditor's suit, respecting the assets of a testator who died before the passing of the 3 & 4 Will. 4, c. 106, it was held that land devised to the heir was not, as between him and other devisees, applicable in payment of debts in exoneration of the land devised to others.—*Bierderman v. Seymour*, B. 368.
6. (*Priority of inquiries—Rule.*) In a suit to administer an estate where inquiries are necessary to ascertain a class of persons beneficially interested, the regular course is to direct the inquiry as to such person in the first instance, and not (until that inquiry is answered) to order the master to proceed to take the accounts. It is only where the circumstances of the case are such as to satisfy the Court that the persons interested are parties to the suit, that the Court will, at the hearing, direct the master to proceed to take the accounts, if he should find the persons interested are parties.—*Baker v. Harwood*, H. 327. See post, *House of Lords Digest, Malone v. Mulone*.

And see PRACTICE, 33.

AGREEMENT.

1. (*Lease—Usual covenants.*) Whether or no an agreement for a lease provides that the usual covenants shall be inserted in the lease, each party is entitled to have such covenants inserted as are incidental to and necessary to protect the rights given or reserved to each. Accordingly, under an agreement for a lease of minerals, the payments to be accelerated with an increase in the quantity of work, it was held that the lessor was entitled to have a right of entry and inspection secured to him by this lease.—*Blakesley v. Wheldon*, H. 179.
2. (*Statute of Frauds—Signature.*) J. R. Bridges, having five freehold houses, but no other property, in Cable Street, Liverpool, agreed to sell them to J. Bleakley for 248l.; and thereupon drew up the following memorandum in his own hand-writing: "July 26th, 1839. John Bleakley agrees with J. R. Bridges, to take the property in Cable Street for the net sum of 248l. 10s.:" Held, that the agreement was sufficiently signed by the vendor.—*Bleakley v. Smith*, S. 150.

ARBITRATION.

1. (*Defective award.*) Held, that an award was not deficient for either of the following reasons: 1. That it assumed that the balance of an account which was incidental to the subject of the reference would be on a particular side, and accordingly directed a sum, forming an item in the account, to be paid on a particular day, without regard to the fact whether the account should be then wound up or not. 2. That it did not provide a remedy for the right which it declared, inasmuch as it contained no order for payment of the balance which should be found due upon the accounts.—*Wilkinson v. Page*, H. 276.
2. (*Finality of award.*) Where the reference was of all matters in difference mentioned in the pleadings, and one of the points raised by the pleadings was the liability as between themselves of plaintiff and defendant upon a bill of exchange which the defendant had given, and the plaintiff as his surety had indorsed to a third party, but which the defendant insisted that the plaintiff was, as between them, solely liable to pay, as having been party to the fraud by which it was obtained, and the award declared that the liabilities of plaintiff and defendant on the note as between themselves should not be affected: Held, that it was bad for want of finality.—S. C.

ASSIGNEES. See ADMINISTRATION OF ASSETS.

ASSIGNMENT.

- (*Possibility—Consideration.*) The interest of the next of kin of a living lunatic is capable of being assigned; and *semble*, that where such assignment was upon trust to pay the costs, charges, and advances incident to the trust, and then to pay an annuity to the assignor, and then his debts, that the consideration was sufficient. The case was on demurrer, and the bill, which was against the representative of the lunatic, stated that the trustees had advanced monies on the faith of the deed, and that the assignor was willing that his share should be paid to them.—*Hinde v. Blake*, B. 234.

ATTORNEY. See PRACTICE, 33.

ATTORNEY GENERAL. See FELON.

BANK OF ENGLAND.

- (*When to be made a party.*) It is quite clear under the 39 & 40 Geo. 3, c. 36, that the Bank ought not to be made a party to a suit for giving effect to a charge on stock standing in the name of a felon.—*Perkins v. Bradley*, H. 219.

BANKRUPT. See ADMINISTRATION OF ASSETS, 2.

CASE.

(*Conclusiveness of certificate.*) The Court will in a doubtful case abide by the opinion of a Court of common law, upon a case sent to them.—*Northam Bridge Company v. Southampton Railway*, S. 42.

CONSTRUCTION OF STATUTES.

(1 & 2 Vict. c. 110—*Interlocutory order—Jurisdiction.*) Although an order to pay money into Court to the credit of a cause may not be (and it has been held not to be in *Gibbs v. Pike*, 9 Dowl. Pr. Cas. 731) a ground for charging the property of a debtor under the 13th section of the act, yet where upon the assumption that it was a ground for such charge, a memorandum under the 19th section had been entered in the Court of Common Pleas, the Court held that it had no jurisdiction to make an order on the Master of the Court of Common Pleas to vacate such an order.

Semble, that the taking of a defendant under a process of contempt is not such a caption of the person as would under the 16th section invalidate the charge obtained under the 13th section.—*Wells v. Gibbs*, B. 399.

COPYRIGHT.

1. (*Pleading.*) It is not necessary, in order to obtain the injunction, to specify in the bill the passages that have been pirated; but the proper practice is, to state piracy in the bill generally, then to verify the rival works by affidavit, and to compare them in Court.—*Sweet v. Maugham*, S. 51.
2. (*Sale pending injunction.*) The Court will not, except by consent, allow the defendant to continue the sale of the work, though the order for continuing the injunction puts the plaintiff upon terms of bringing an action.—*S. C.*
3. (*Selections.*) Defendant published a book, of which less than a tenth part consisted of an essay on modern poetry, and short biographical notices of different poets, and the rest consisted of extracts and selections of poems in some instances entire, without any notes or criticisms being mixed up with them: Held, that this was a violation of the copyright of one of the poets, whose works had been so used, and an injunction was granted to him, without proof of damage.—*Campbell v. Scott*, S. 31.

COSTS. See DISCLAIMER, 2, 3; FELON; INSOLVENT, 2; PRACTICE, 18, 19; VENDOR AND PURCHASER, 1.

COVENANT. See ADMINISTRATION OF ASSETS, 4; AGREEMENT, 1.

DEBTOR AND CREDITOR. See CONSTRUCTION OF STATUTES; INTEREST.

DISCLAIMER.

1. (*Confirmation of doubtful title.*) Held, that a disclaimer by the husband, by answer, of all interest in a fund given to his wife and her assigns during her life, "for his and their own absolute use and benefit," established the wife's title to the fund as her separate property, and made good a previous disposition of it by her.—*Rycroft v. Christy*, B. 238.
2. (*Costs after disclaimer.*) The official assignee of an insolvent mortgagor disclaimed all interest by his answer, for the alleged reason that the debt exceeded the value of the property, and the suit was nevertheless brought to a hearing against him: Held, that he was not entitled to have his costs out of the property.—*Cash v. Belcher*, H. 310.

3. (*Disclaimers before suit.*) A., being made a party on the suggestion contained in the answer of another defendant, stated in his answer that he had before the beginning of the suit given notice to such defendant of his having disclaimed all interest, but did not go into evidence of his having done so. The Court would not give him costs without inquiry as to the fact.—*Perkins v. Bradley*, H. 219.
4. (*Tithe suit.*) In a suit by a vicar against an occupier for an account of some small tithes, it was held that the disclaimer of the rector by answer of all interest in the small tithes, might be used as one ground for giving the particular account prayed, but not as a ground for establishing the right.—*Salkeld v. Johnston*, H. 196.

DISCOVERY.

1. (*Discovery essential to relief.*) Where a bill is answered, the Court will assume, as regards the right to discovery, that the plaintiff is entitled to the relief he asks for, and will therefore give him such discovery as, though not relating to his right, may be essential to the working out of his remedy. Accordingly, on a bill against A. and B. to set aside for fraud an annuity deed which had been assigned to A. (with notice of the fraud as the bill alleged,) and by him deposited with B. his bankers, together with other deeds, as a security for money advanced by B. to A., and the bill prayed that the property charged by such other deeds might be first applied in discharge of A.'s debt to B.: it was held that A. was bound to answer as to those other deeds, "so far at least as to say what they were."—*Duncombe v. Davis*, H. 184.
2. (*Sufficiency of legal title.*) The assignee of lessor, by his bill of discovery in aid of an action brought upon a covenant in the lease, stated that the lessor was at the time of granting the lease "seised or otherwise well entitled, &c. &c.": Held, on demurrer, that this was not a sufficient allegation of a legal title in the lessor, entitling his assignee to sue at law.—*Balls v. Shargrave*, B. 284.

ELECTION.

1. (*Replacement of stock.*) Where in a case of election a person elected to take under a bequest giving her a life interest in a certain sum which was directed to be invested in stock, with which direction the legatee, who was also trustee of the will, did not comply, but appropriated the money: Held, that she was responsible for that sum only, and not for what would have been its value at the time of the suit, if invested at the proper time.—*Palmer v. Wakefield*, B. 227.
2. (*Waiver—Consideration.*) An unmarried lady being entitled to 5000*l.* charged upon a real estate of which she was tenant for life, with remainder to her children in tail, and being entitled also to a sum of stock for her life, with remainder to her children absolutely, by the settlement on her marriage released the real estate from the 5000*l.*; and, supposing that the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage, the parties to the settlement having discovered the mistake as to the stock, made an indorsement on the settlement, by which, after reciting that they had so discovered, they declared that thenceforth the stock should be held by the original trustees thereof (in whose name it was still standing), upon the trusts to which it was subject before and at the date of the settlement: Held, that the children of the marriage could not claim the benefit of the release of the 5000*l.*, and also the sum of stock, to the prejudice of their father's interest therein under the settlement; but that, before the indorsement was made, he was entitled to put them to

their election, and that he had not lost that right by being a party to the indorsement.—*Seton v. Smith*, S. 59.

EVIDENCE. See *ISSUE*, 2 ; *PRACTICE*, 20.

FELON.

(*Assignment before conviction.*) Assignment of stock by prisoner under charge of felony, to secure a previous debt, and the costs of his defence, held good after his conviction ; and the Attorney-general claiming the fund was held not entitled to his costs.—*Perkins v. Bradley*, H. 219.

FREIGHT. See *WILL*, 5.

HUSBAND AND WIFE.

(*Breach of trust by wife.*) Husband held liable for breach of trust committed by wife before marriage.—*Palmer v. Wakefield*, B. 224.

And see *SEPARATE PROPERTY*.

INFANT. See *MAINTENANCE*.

INJUNCTION. See *INTERPLEADER* ; *JURISDICTION*.

INSOLVENT.

1. (*Deceased assignee.*) Although, on the death of the assignee of an insolvent's estate, any creditor of the insolvent may get a new assignee appointed by the Insolvent Debtors' Court, and all the insolvent's property, which was vested in the deceased, will immediately thereupon become vested in the new assignee, yet, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee.—*Fletcher v. Howell*, S. 100.
2. (*Foreclosure—Costs of provisional assignee.*) In a foreclosure suit, to which the provisional assignee of an insolvent is a necessary party, not having disclaimed all interest before the institution of the suit, his costs will not be charged upon the mortgaged property.—*Appleby v. Duke*, H. 303.
3. (*Jurisdiction—Demurrer by assignees.*) An insolvent debtor and his wife conveyed estates, belonging to the latter, to trustees, to raise and pay 35,000*l.* to the insolvent's assignees (who were parties to the deed,) for the benefit of his creditors. The insolvent died before that sum was raised ; and, after his death, the assignees made a compromise with his widow, by which they agreed to accept from her a smaller sum. One of the creditors filed a bill against the assignees, the trustees and the widow charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the defendants might be restrained from carrying the compromise into effect. A demurrer by the assignees, on the ground of want of jurisdiction, was allowed ; as the plaintiff ought to have applied to the Insolvent Debtors' Court to remove the assignees.—*Youens v. Robinson*, S. 105.

And see *DISCLAIMER*, 2.

INTEREST.

(*3 & 4 Will. 4, c. 42—Interpleader.*) Where interest is payable at law under the above statute, upon a debt which is made the subject of an interpleading suit, the plaintiff should, by his suit, offer to pay it.—*Bignold v. Audland*, S. 23.

INTERPLEADER.

1. (*Identity of subject—Chose in action.*) Where the plaintiff might be liable at

law to pay to both the defendants the amount of their demand, it is not a proper case for interpleader, and that, it seems, is the proper way of testing whether there is that identity in the subject of the demand which entitles the plaintiff to file a bill of interpleader.

In this case one of the defendants in equity claimed as assignee of an insolvent creditor of the plaintiff; the other defendant claimed to make the same sum an item in an account current between him and plaintiff, as having paid it to or on account of such creditor: Held, that it was no case for interpleader.—*Glyn v. Duesbury*, S. 139.

2. (*Payment into Court*.) Payment into Court is no sufficient ground for overruling a demurrer to a bill of interpleader.—S. C.
3. (*Prosecution of suit*.) Although the omission of the plaintiff to enforce an answer from one of the defendants within a reasonable time, might give the other defendant the right to move to dissolve the injunction (granted on filing the bill), and for payment of the money in dispute to him, yet, in such a case, when the answer was put in, pending the notice of motion, the Court continued the injunction and directed an issue.—*Townley v. Deacons*, B. 213.

And see INTEREST; PLEADING; PRACTICE, 25.

ISSUE.

1. (*Advance of money*.) The Court, advertng to the uncertainty of the claim and the state of the fund in Court, refused to order an advance out of that fund, to enable one party to defend an issue, which had been directed, and disapproved of such advances generally.—*Johnston v. Todd*, B. 218.
2. (*Evidence—Depositions in cause*.) An issue having been directed, to be conducted on one side by persons not parties to the cause, who had since come forward claiming to be next of kin, the Court refused to order the depositions and affidavits made in the cause by witnesses who had since died, to be used on trial of the issue.—S. C.
3. (*Pro confesso*.) Although upon the authority of *Casborne v. Barsham* (before the Lord Chancellor, not yet reported,) one default in proceeding to trial of an issue at the time appointed, is a sufficient ground for taking such issue adversely *pro confesso* against the party making default; it is not so if he had a reasonable cause for the delay, and the pendency of a treaty for a compromise was held to be such cause.—S. C.

JOINT STOCK COMPANY.

(*Parties—Fraud*.) Where a bill was filed by the representatives of a bankrupt shareholder against one of the other shareholders who had become possessed of part of the bankrupt's shares under a transaction which the bill sought to set aside as fraudulent, a demurrer for want of parties was overruled, and the decision sustained on appeal; the Lord Chancellor observing that he adhered to what he had said in *Mare v. Malachy*, 1 M. & C. 577.—*Turner v. Hill*, *Same v. Tyacke*, *Same v. Borlase*, S. 1, 16, 17.

And see PRACTICE, 25.

JURISDICTION.

(*Mandatory injunction*.) The Court held that it had no jurisdiction to restrain the lessee of an inn from discontinuing to keep the inn open as he had covenanted to do.—*Hooper v. Brodrick*, S. 47.

And see CONSTRUCTION OF STATUTES; INSOLVENT, 3; PATENT.

KEEPER OF RECORDS. See **PATENT.**

LACHES. See **INTERPLEADER**; **ISSUE**, 3.

LEASE. See **ADMINISTRATION OF ASSETS**, 4; **AGREEMENT**, 1.

MAINTENANCE.

(*Extra maintenance—Discretion of trustees—Reference.*) Where trustees having a discretion to apply what part they thought fit of an income of 800*l.* in the maintenance of an infant, had not exercised that discretion, and an allowance only of 300*l.* was made by the party in possession of the fund to the infant's mother and stepfather, by whom she was brought up, and they, without knowing what was the income to which the infant was entitled, had expended in her maintenance considerably more than the sum allowed; on a bill filed by them against the holder of the fund and the trustees, without making the infant a party, with a view of recovering the extra expenditure, the trustees, by their answer admitting that they would, if applied to, have allowed more than 300*l.*, and that the extra expenditure was proper, it was referred to the master, to inquire what was proper to be allowed to the plaintiffs for the maintenance of the infant from the time of her becoming entitled to the fund.—*Stopford v. Lord Canterbury*, S. 82.

MORTGAGE.

(*Enlarging time of payment.*) Where, after the report and day of payment fixed, in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mortgagor, within one month, of the interest and costs found due by the report, notwithstanding there was a doubt whether the value of the security was ample.—*Geldard v. Hornby*, H. 251.

And see **INSOLVENT**, 2; **PARTIES.**

NEW ORDERS.

1. (*Absent parties—40th order.*) The Court will not, under the above order, make a decree altering the state of a fund, so as to diminish the security which an absent party has for the satisfaction of his claim.

Where a creditor had assigned his estate and effects to trustees for the payment of his debts, and afterwards died intestate, the Court would not, in the absence of his representative, proceed in a suit instituted by the creditors against the trustees, though the latter stated that the fund was not nearly sufficient for payment of the debts, and that no administration had been taken out. The fund had been brought into Court.—*Kimber v. Emsworth*, H. 293.

2. (*8th order—Appearance.*) The 8th order of August, 1841, is not imperative; and a plaintiff may, notwithstanding, proceed according to the old practice, to enforce appearance by attachment.—*Collins v. Brown*, H. 315.
3. (*43rd order—Proving exhibits.*) The 43rd order of August, 1841, allowing exhibits to be proved by affidavit, instead of *vivâ voce*, at the hearing, does not dispense with the necessity of obtaining the order of leave to prove the exhibit at the hearing; but that order may be obtained after the affidavit has been made.—*Clare v. Wood*, H. 314.
4. (*23rd and 24th orders—Serving copy bill.*) The affidavit of service of the copy of the bill, under the 23rd order of August, 1841, on the motion for leave to enter the memorandum of service, under the 24th order, must show that in the copy served the interrogating part was omitted. The prayer, under the 23rd

order, "that the defendant, upon being served with a copy of the bill, may be bound," &c. will be required to be inserted in the prayer of process.—*Gibson v. Haines*, H. 317.

NOTICE.

(*Solicitor.*) A solicitor who prepared a deed of charge on behalf of mortgagor and mortgagee, held to have such notice of it as to postpone a subsequent security taken by himself from the mortgagor, though he had possession of the fund.—*Perkins v. Bradley*, H. 219.

PARTIES.

(*Redemption suit.*) A compulsory suit for redemption cannot be maintained by a party having only a partial interest in the equity of redemption, in the absence of the other parties interested.—*Henley v. Stone*, B. 355.

And see *BANK OF ENGLAND*; *INSOLVENT*, 1; *JOINT STOCK COMPANY*; *MAIN-TENANCE*.

PARTNERSHIP.

(*Account—Surviving partners.*) Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving, and the estate of the deceased, partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime, or by the amount of the agreed capital which they were respectively to supply, or by the actual amount of the capital belonging to the surviving and the estate of the deceased partner respectively; but the principle of division may be affected by considerations, of the source of the profit, the nature of the business, and the other circumstances of the case.—*Willett v. Blandford*, H. 253.

And see *TRUSTEE*, 1.

PATENT.

(*Amendment of enrolment—Jurisdiction.*) The jurisdiction of the Master of the Rolls, as keeper of the records, extends to the amendment only of clerical errors in the enrolment of patents: accordingly, where under the 5 & 6 Will. 4, c. 83, a patentee had, by the authority of the Solicitor-General, entered a memorandum of alteration of the enrolment of the specification, which it was alleged was not according to the provisions of the act, as being an extension of the patent, to the prejudice of another patentee who petitioned that the alteration might be expunged, it was held that the Master of the Rolls had no jurisdiction to do what was asked.—*Re Sharpe's Patent*, B. 245.

PLEADING.

1. (*Effect of admission—by plea.*) Where a party claiming a partial interest in an estate subject to a mortgage filed a bill for redemption, and to be relieved as against the same party from a fraud affecting the interest in respect of which a redemption was sought, which interest being only partial would not, as it was held, entitle him, in an ordinary case, to sue without joining the other parties interested, it was held that a plea of want of parties was not a sufficient admission of the fraud stated in the bill to induce the Court to depart from its usual course on that ground.—*Henley v. Stone*, B. 355.
2. (*Excessive prayer.*) Where a bill was filed against one shareholder in a mine to recover possession of one-hundredth share, but a receiver was also prayed of the profits of the said mines, held on demurrer for want of parties, that these

words be understood of the profits of the one-hundredth share only.—*Turner v. Hill*, S. 1.

3. (*Letters—Evidence.*) Letters are inadmissible as evidence even upon a question of costs, unless they have been referred to in the pleadings.—*Whitley v. Martin*, B. 226.
3. (*Multifariousness—Interpleader.*) A. having in his hands a sum of money, which B. and C. claimed adversely to each other, filed a bill against them, praying that they might interplead respecting the sum. The bill also sought the decision of the Court as to a claim made by B. to interest on the sum, and raised a question as to the costs of an action which B. had brought to recover the sum: Held, that the bill was not sustainable as a bill of interpleader, and that it was multifarious.—*Bignold v. Audland*, S. 24.

And see COPYRIGHT.

POLICY OF ASSURANCE.

(*Order and disposition—Notice of assignment.*) All the assured in the Equitable Assurance Office are partners in the society; and, therefore, express notice of an assignment of a policy effected with that society, need not be given, in order to take the policy out of the order and disposition of the assignor.

The report of *Bozon v. Bolland*, in 1 Mont. and Bligh's Reports, corrected.—*Duncan v. Chamberlayne*, S. 123. See post, Bankruptcy Digest, Reputed Ownership.

PRACTICE.

1. (*Advancing cause.*) A motion to advance a cause can not be made without notice to the other party.—*Powell v. Calloway*, S. 51.
2. (*Affidavit—Injunction.*) Semble, that on showing cause against a motion to dissolve a common injunction, affidavits were admissible to prove facts stated by the bill, and neither admitted nor denied by the answer.—*Ord v. White*, B. 357.
3. (*Affidavit—Master extraordinary.*) Affidavit on behalf of plaintiff sworn before a master extraordinary, who was clerk to plaintiff's attorney, rejected.—*Wood v. Harpur*, B. 290.
4. (*Amendment—Costs.*) Where leave was given to amend with costs, held, that an amendment by which the names of all the plaintiffs but one was struck out, who was made to sue on behalf of the others, thus evading as to them the liability for costs, could not be made under that order; but the amendment was allowed to stand upon security for costs being given.—*Fellowes v. Deere*, B. 353.
5. (*Amendment—Costs of abandoned claim.*) Plaintiff abandoning by amendment part of his original claim, which it appeared he had brought forward vexatiously, ordered to pay the costs thereby occasioned.—*Strickland v. Strickland*, B. 242.
6. (*Amendment of plea.*) On a plea being overruled, as insufficient in law, leave was given to plead *de novo*, and to the plaintiff to amend his bill.—*Chadwick v. Broadwood*, B. 316.
7. (*Award.*) A motion to make an award an order of Court is not a motion of course, but a special motion to be made upon notice.—*Wilkinson v. Page*, H. 280.
8. (*Common injunction.*) The defendant being in contempt for want of appearance, the common injunction was extended to stay trial on a motion made without notice.—*Harrison v. Dixon*, S. 123.
9. (*Computation of days—Sunday.*) Held, that an intermediate Sunday was pro-

perly counted in the number of days notice of the time and place of examining a witness.—*M'Intosh v. Great Western Railway Company*, H. 330.

10. (*Contempt*—11 G. 4 & 1 W. 4, c. 36.) Plaintiff did not proceed, within the time limited by 11 G. 4 & 1 Will. 4, c. 36, rule 13, to take the bill *pro confesso* against a defendant who was in prison for want of answer. After that time had expired, the defendant filed his answer, and then moved, under the rule, to be discharged, without costs: Held that, as the defendant had not applied to be discharged until after he had disabled the plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and therefore the defendant could not be discharged without paying the costs of his contempt.—*Williams v. Newton*, S. 45.
11. (*Same.*) The 16th sect. rule 5, of this act, does not make it imperative upon the plaintiff to bring a defendant, who is in custody, up to the bar of the Court within thirty days, but only deprives the plaintiff of the benefit of his process, and entitles the defendant to his discharge, if the plaintiff does not so bring him up.
A prisoner, who, having been placed in custody by a lawful attachment, has remained in prison voluntarily, without claiming his discharge, after he was entitled to be discharged, may be regularly detained under another attachment lawfully issuing against him.—*Woodward v. Conebeer*, H. 297.
12. (*Costs*—*Form of order for payment.*) The form of the decree, on dismissal of a bill with costs, ordered to be altered by adding the words "*to be paid by the plaintiffs*," with reference to the first order of the 10th of May, 1839, giving a remedy by fieri facias or elegit for costs ordered to be paid.—*Taylor v. Jardine*, H. 316.
13. (*Costs*—*Security.*) New security ordered to be given for costs, the surety having become bankrupt.—*Veitch v. Irving*, S. 122.
14. (*Discharge of order*) On a motion to discharge an alleged irregular order, no parties can be heard in support of the application but those who have joined in the notice of motion to discharge it.—*Stubbs v. Sargon*, B. 408.
15. (*Dismissal*—*Abatement.*) A sole plaintiff in a suit to redeem a mortgage having died, the Court, on the application of the defendant, after full consideration of the authorities, ordered that the administrator should revive, or the suit be dismissed without costs.—*Chowick v. Dimes*, B. 290.
16. (*Dismissal*—*Bill to perpetuate.*) The Court will not, even before replication, dismiss a bill to perpetuate testimony, for want of prosecution; but will order the plaintiff to reply and examine his witnesses, and procure the examination to be completed by a certain time; and, in default thereof, to pay to the defendant his costs of the suit.—*Beavan v. Carpenter*, S. 22.
17. (*Dismissal*—*Supplemental bill.*) Where a bill had been dismissed for want of prosecution as against one of several defendants, and he was afterwards, at the hearing, held to be a necessary party, the Court would not allow a supplemental bill to be filed against him, but dismissed the suit with costs.—*Lautour v. Holcombe*, S. 71. (See S. C. 8 Sim. 76.)
18. (*Double motion*—*Costs*) Where a defendant having admitted the possession of documents and a balance due, two separate motions were made for production and payment; the Court said, that the two points should have been comprised in one motion, and ordered the extra costs to be paid by the plaintiff.—*Hawke v. Kemp*, B. 288.

19. (*Double plea—Costs.*) Where two several pleas on the same ground were put in by two defendants, through the same solicitor, the costs of one only were allowed.—*Tarbut v. Woodcock*, B. 289.
20. (*Evidence—De bene esse.*) Held, upon full consideration of the authorities, that an application for an order to examine a witness *de bene esse*, as being the only witness to a material fact, ought to be made upon notice, and the affidavits in support of such an application ought to state the grounds for believing that he is such sole witness of a material fact.—See cases cited in note, *Hope v. Hope*, B. 317.
21. (*Examination of witness.*) An order for the examination *de bene esse* of a witness about to go abroad may be obtained *ex parte*.—*M^r Intosh v. The Great Western Railway*, H. 328.
22. (*Exceptions—Advancement of hearing.*) The Court, to prevent delay, will on an *ex parte* motion, advance for an early hearing exceptions to a master's report on a reference for impertinence.—*Holmes v. The Corporation of Arundel*, B. 408.
23. (*Exceptions—Amendment.*) It is the rule that a plaintiff, after amending his bill, cannot take exceptions for any deficiency in the answers to the interrogatories contained in the original bill, and the master ought, upon a reference of exceptions taken to the answer to the amended bill, to see whether the questions to which they refer are contained in the original bill; unless, which may be done in special cases, he is directed by a special order of reference, as in *Glassington v. Thwaites*, 2 Russ. 658, not to do so. *Quere*, as to what will be sufficient ground for such special order.—*Duncombe v. Davis*, H. 184.
24. (*Impertinence—Affidavits.*) Affidavits referred for impertinence cannot be used pending the reference, but the Court will refrain from acting till time has been given for getting the report.—*Pearce v. Brook*, B. 337.
25. (*Interpleader—Joint stock company.*) The affidavit annexed to such a bill filed by the public officers of a company ought to state not that the plaintiff does not collude, but that to the best of his knowledge and belief the company do not collude with either of the defendants.—*Bignold v. Audland*, S. 23.
26. (*Ne exeat.*) The writ of *ne exeat* must be prayed for by bill, but see *Moore v. Hudson*, 1 Mad. & Geld. 218.—*Sharp v. Taylor*, S. 50.
27. (*Preliminary inquiries.*) Preliminary inquiries will not be directed under the 5th Order of 9th of May, 1839, as to that which constitutes the foundation of the suit, and consequently not as to who are the next of kin of a deceased person, where a claim is made in that character, the answer not admitting the plaintiffs to be such next of kin.—*Topham v. Lightbody*, H. 289.
28. (*Preliminary inquiries—Proceedings at law.*) Although an order for preliminary accounts and inquiries has been obtained in a suit for administering a testator's estate, yet the Court will not, on that account, restrain a creditor from suing the executors at law. The order, however, does not prevent the parties from having the cause heard, before the master has made his report.—*Teague v. Richards*, S. 46.
29. (*Report—Confirmation.*) Held, by the Lord Chancellor, reversing the order of the Vice-Chancellor, in a case where the order of reference was to inquire what reparation the defendant should make to the plaintiff for acts of bad husbandry done by him in contempt of the order of the Court, and that the defendant

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the master made his certificate in the usual way, and thereupon an order was obtained for taxing the costs of taxation; the Court refused, on motion, to discharge such latter order as irregular, saying that it was first necessary to get relieved by a distinct application (by petition) from the certificate.—*Muskett v. Hill*, B. 301.

39. (*Same.*) *Attorney-General v. Nethercoat*, B. 397.

40. (*Title of petition.*) An order for taxation made on a petition which was intituled in a non-existing cause, though it was intituled also "In the matter of A. B., solicitor," and had been duly served, discharged upon motion.—*West v. Smith*, B. 306.

And see **DISCLAIMER**, 2, 3.

PRODUCTION OF DOCUMENT.

1. (*Affidavit of defendant.*) Defendant allowed, on motion for production, to state by affidavit reasons for concealing part of the documents admitted by the answer to be in his possession, and which he did not by his answer object to produce whole.—*Curd v. Curd*, S. 274.

2. (*Defendant's title.*) Where a claim was made on behalf of a charity to lands, out of which it was contended by the defendant a rent-charge only was payable to the charity, the Court refused to order the defendant to produce his title-deeds to the land in question, which he said by his answer did not make out or evidence the title of the charity, except as to the rent-charge, which was not in question.—*Attorney-General v. Strutt*, B. 396.

SEPARATE PROPERTY.

(*Restraint on alienation—Proper form of securing it.*) The form commonly used in giving property to the separate use of married women is not such as to restrain them from anticipation. For that purpose the receipt clause ought to declare that the receipts of the married woman, to be given from time to time after the income of the property shall have become due, shall be, and that no other receipts shall be, sufficient discharges to the trustees.—*Brown v. Bamford*, S. 127.

And see **WILL**, 4.

SHIP. See **WILL**, 5.

SOLICITOR.

1. (*Sale of business—Injunction.*) An agreement by a solicitor, made for valuable consideration on the sale of his business, not to practise as solicitor in any part of Great Britain for twenty years without the consent of the purchaser, held valid, and an injunction granted to restrain the seller accordingly from practising, and from endeavouring to induce any persons who were clients of the former and present firm to cease to employ the latter. An injunction was also granted to restrain the seller from detaining or destroying certain papers and documents belonging to the firm which he had got in his possession.—*Whittaker v. Howe*, B. 383.

2. (*Solicitor and trustee.*) A solicitor being a trustee allowed under a special contract to charge for his professional services.—*Re Sherwood*, B. 338.

STATUTE OF FRAUDS.—See **AGREEMENT**, 2.

STATUTE OF LIMITATIONS.

(*Adverse possession—Property under lease.*) Where property is under lease, adverse possession under 3 & 4 W. 4, c. 27, does not commence from non-payment of

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rent, but from payment of rent to a wrongful claimant. Accordingly a plea of non-payment of rent for five years, and of adverse holding over by tenant for fifteen years after expiration of lease, was held insufficient.—*Chadwick v. Broadwood*, B. 305.

TITHES.

1. (*Tithe Limitation Act.*) The act 2 & 3 Will. 4, c. 100, commonly called Lord Tenterden's act, which shortens the period of prescription against tithes, does not dispense with the necessity of showing, in cases where an exemption is claimed, that the land in question once belonged to one of the greater monasteries, who alone were competent to hold lands exempt from tithe.—*Salkeld v. Johnson*, H. 196.
2. (*Vicarial tithes—Proof by implication.*) It is not conclusive of the vicar's right to all the small tithes, that he should have proved his right to some of such tithes.—S. C.

TRUSTEE.

1. (*Infant Trustee—Partnership estate.*) Four copartners purchased an estate out of the partnership assets, and took a conveyance to themselves as tenants in common in fee. One of them died intestate as to his real estate, leaving an infant heir. The survivors settled with his executors for the value of one fourth of the estate, and then petitioned, under the 11 Geo. 4 and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The Court refused to make the order, and said that a bill must be filed.—*In the matter of* 11 Geo. 4 and 1 Will. 4, c. 60, *Ex parte Williams*, S. 54.
2. (*Trust for advancement.*) When two trustees under a will, one of them the wife of the testator, had a power to make advances to the testator's children, and there was a direction to appoint new trustees or a new trustee, in case of the first two or either of them dying or not acting, and the wife only acted, held, that the power of making advance was not vested in her, and the Court refused to enquire into the propriety of particular advances made by her.—*Palmer v. Wakefield*, B. 227.

And see SOLICITOR.

VENDOR AND PURCHASER.

1. (*Costs—Railway Company.*) A. agreed to sell land to a railway company; but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant. Held that, although the company were bound by their act to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit and of having the conveyance settled by the master, must be paid out of the purchase-money.—*The Midland Counties Railway Company v. Westcombe*, S. 57.
2. (*Unaccepted offer.*) The defendant, on the 6th of June, offered in writing to sell his farm for 1000*l.*; but the plaintiff offered 950*l.*, which the defendant on the 27th of June, after consideration, refused to accept. On the 29th the plaintiff, by letter agreed to give 1000*l.*, but there appeared to be no assent on the part of the defendant, though there had been no withdrawal of the first offer: Held that there was no binding contract within the Statute of Frauds. *Hyde v. Wrench*, B. 334.

VOLUNTARY DEED.

(*Equitable interest.*) A direction given by deed by a cestui que trust to her trustee to pay a certain portion of the interest of the trust fund to A. with a covenant to indemnify the trustee for such payment, (there being some doubt as to whether the husband of the cestui que trust had not an interest in the fund, but which interest if any he afterwards disclaimed): Held to constitute an irrevocable gift, which was not affected by the fund being brought into Court.—*Rycroft v. Christy*, B. 238.

WILL.

1. (*Construction "all my money."*) "I give to my wife all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease." Held that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house, and the interest of a sum due on mortgage, did not pass.—*Fryer v. Ranken*, S. 55.
2. (*Construction—gift to classes.*) Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes: Held, nevertheless, that they were entitled to only one share each.—*Pruett v. Osborne*, S. 132.
3. (*Construction—Issue read children—Rule.*) Where in a will, after a bequest to certain persons and the lawful issue of such of them as should be dead, it is provided that such issue are to take only the share which their deceased parents would have been entitled to if living, issue will be read children.—S. C.
4. (*Construction—Joint interest.*) Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge: Held, that the daughter and her children living at the testator's death were entitled to the residue jointly.—*De Witte v. De Witte*, S. 41.
5. (*Construction—Money due—Freight.*) Testator bequeathed to A. B. all his ships and money due to him at the time of his decease: Held, that freight earned after his decease under a charter-party executed before that event, but after the will, did not pass.—*Stephenson v. Dowson*, B. 342.
6. (*Construction—Power of sale—Executor.*) Testator, after giving personal property and a freehold house to his wife for life, with liberty to sell the house, directed that if it were not sold during her life, it should be sold at her death (without saying by whom), and the proceeds divided among certain parties; and he appointed his wife and A. and B. executors and trustees of his will. The widow and A. alone proved the will, and the widow died, without having sold the house, twenty-five years after the death of the testator: Held, B. being then dead, that A. had power to sell, and also to give receipts alone for the purchase-money, the property being by the will charged with his debts.—*Forbes v. Peacock*, S. 152.
7. (*Construction—Revocation—Mistaken reference.*) Testator, by his will, gave 500*l.* to A. and 1000*l.* to B., to be paid within twelve calendar months after his wife's death. By a codicil, of the same date, he reduced those legacies to

300*l.* and 500*l.* respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of 500*l.* to A., he revoked that bequest, and, in lieu of it, gave A. 300*l.*, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that by his will he had given to B. 3000*l.*, he reduced that legacy to 2000*l.*; and then directed that the 300*l.* given to A., as well as the 1000*l.* given to B., should not be paid till twelve months after the death of his wife: Held, taking all the instruments together, that B. was entitled to a legacy of 1000*l.*—*Grand v. Reeve*, S. 66.

8. (*Construction—Specific legacy.*) Held, that by the description “all the dividends, &c. of all such stock as the testator should have at the time of his death in the public funds,” a sum of 10,000*l.* consols, which the testator held at the time of his decease, but not at the time of his will, passed as a specific legacy.—*Stephenson v. Dowson*, B. 362.

9. (*Construction—Tenant for life—Conversion of residue.*) Testator directed his real and personal estate (consisting in great part of a share in a trading concern in Portugal, as to which he gave a discretion to his executors to continue it in that state for five years) to be got in and converted, and the produce invested in real or government securities, of which he gave the income to his wife for life, remainder over.

The Court, upon a full review of the cases, held that the wife was entitled from the death of the testator to the actual income of so much of the property as was then invested, as the whole was by the will directed to be; and that upon the authority of *Dimes v. Scott*, 4 Russ. 195, she was also entitled, from the death of the testator, to the computed income which the other property would have produced if converted immediately and invested according to the will.

The Court disapproved of *Douglas v. Congreve*, 1 Keen, 410, where the actual income of such property as last mentioned was given during the first year to the tenant for life.—*Taylor v. Clark*, H. 161.

10. (*Construction—Vesting—Period of survivorship.*) Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death, but only one of them survived the annuitant: Held, that the capital of the stock, which had been provided to answer the annuity, did not vest in the surviving child on the annuitant's death, but vested on the testator's death in all the children then living, as tenants in common.—*Watson v. Watson*, S. 73.

11. (*Power—Legacy and probate duty.*) A testator gave his residuary estate in trust for his daughter for life, remainder to such persons, other than A., B. and C. and their relations, as she should by will appoint; and if she married or received visits from A. or any of his relations, the power was to be forfeited. The daughter afterwards appointed the property by her will: Held, agreeably to the certificate of the Court of Exchequer, in spite of the restriction as to the objects of the power and the mode of its exercise, and its liability to forfeiture, 1st, that the property as bequeathed by the father was liable to legacy duty under the 18th section of the 36 G. 3, c. 52, though that section applies in terms only to the case of a “general and absolute power;” 2dly, that as be-

queathed by the daughter it was subject to the legacy duty as "property which she had power to dispose of;" 3dly, that no probate duty was payable in respect of it upon the daughter's will, under the 2nd section of the 55 G. 3, c. 184.—*Platt v. Routh*, B. 257.

12. (*Probate of will of land.*) Where a bill was filed to establish a will of real estate, and a plea was put in, that the will *as proved in the Ecclesiastical Court* did not contain some of the passages stated in the bill, and necessary to give title to the plaintiffs, the plea was overruled.—*Strickland v. Strickland*, B. 224.
 13. (*Satisfaction.*) Testator, having by deed, made for valuable consideration, charged particular freehold estates with annuities of 300*l.* to each of his sisters for life, payable quarterly in January, April, July and October, (with a gift in remainder to the husband of one of them of 150*l.* a year for his life,) afterwards by will devises all his estates upon trust to pay to his widow an annuity expressly in lieu of dower and of any payment she might be entitled to under his marriage settlement, and, subject to a trust for payment of his debts, upon trust to pay one of his sisters an annuity of 900*l.* and the other an annuity of 500*l.*, in each case for their separate use, and the annuities to be payable on the four most usual quarterly days of payment: Held, that the annuities given by the will were not in satisfaction of those secured by the deeds.—*Hales v. Darell*, B. 324.
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BANKRUPTCY.

[Containing Cases in 2 Montagu, Deacon, and De Gex, Part 1.]

ACT OF BANKRUPTCY.

(*Debtor absenting himself.*) A trader, having attended a meeting of his creditors, is desired by them to withdraw until they can come to some resolution on the state of his affairs; he accordingly retires into an outer room, where he is served with a copy of a writ; upon which he abruptly leaves the place of meeting, first sending for his hat into the room where the creditors were met, and does not return until the end of an hour, when the meeting had broken up: Held, that this was an act of bankruptcy.—*Exp. and re Dean*, 127.

ANNULLING.

1. (*Absent bankrupt—Petition by relatives.*) The Court would not entertain a petition of a relative of the bankrupt to annul the fiat, on the alleged ground that his remaining abroad was without any intention to delay his creditors, when the petition was presented without the bankrupt's privity, and he himself made no affidavit on the subject.—*Exp. Rhodes, re Wood*, 41.
2. (*Petition by bankrupt.*) The Court refused to annul on petition by bankrupt two years after the death of petitioning creditor, and where the affidavit of the bankrupt in support of the petition differed, as to the statement of trading, from his deposition before the commissioners.—*Exp. and re Ford*, 111.
3. (*Trust deed.*) Fiat annulled to give effect to a trust deed, the petitioning creditor consenting.—*Exp. Yates, re Peake*, 123.

APPROPRIATION OF PAYMENT.

(*Discharge of surety.*) Where a man paid into his banker's a joint promissory note, payable on demand, signed by himself and another party as his surety, of which the amount was carried to his account as money, and afterwards paid in at different times money more than sufficient to cover the amount, but drew out more than he paid in: Held, that the surety was not entitled to have the subsequent payments of the principal debtor applied first in payment of the note, not being a party to the accounts between him and his banker.—*Exp. Whitworth, re Mayor*, 164.

ASSIGNEES.

1. (*Choice—Removal.*) Where the proof of a debt, sufficient to turn the choice of assignees, had been opposed by the solicitor to the fiat, upon frivolous grounds, which, however, the commissioner held to be good, and refused to allow a reasonable time to the creditor to remove the objection, which he could have easily done, and the creditor was thus disabled from voting in the choice of assignees, a new choice was directed.—*Exp. Spiller, re Waters*, 43.
2. (*Removal.*) Where an assignee had sold his debt to a creditor who was adverse to the fiat, he was ordered to be removed, and a new one chosen in his

room, and he was restrained from voting in the choice of the new assignee.—*Exp. Stagg, re Barton*, 186.

3. (*Removal—Petition by bankrupt.*) *Quære*, how far a bankrupt is entitled to petition for the removal of an assignee. In this case the petition, which was presented by him and one of the assignees, was dismissed on other grounds, with costs to be paid by petitioning assignee.—*Exp. and re Oakes*, 60.

BANKRUPT.

(*Right to account from assignees—Default.*) Where a bankrupt, who was abroad when the commission issued, returned after many years, and obtained an order for leave to surrender and pass his examination, and went down accordingly to Liverpool and surrendered himself, but no one appearing to examine him, the meeting was adjourned for three months, not at the request of the bankrupt; though so stated, according to the usual form in the order of adjournment: Held, that the non-attendance of the bankrupt at such adjourned meeting did not deprive him of his right, under the 132d sect. of 6 Geo. 4, c. 16, to call upon the assignees to declare how they had disposed of his estate.—*Exp. and re Tarleton*, 189.

And see ASSIGNEES, 3; CERTIFICATE, 1.

BANKRUPT TRUSTEE.

(*Notice of breach of trust—Acquiescence.*) Where a party, not having at the time any interest in the trust fund, acquiesced in a breach of trust by the bankrupt, but afterwards became administrator of the *cestui que trust*: Held, that his rights in the latter character were not prejudiced by his previous acquiescence. *Exp. Smith, re Clarke*, 113.

BILL OF EXCHANGE.

(*Lien—Special agreement.*) A London firm advance money to a merchant, who is about to make a consignment to their correspondents in Calcutta, and they take as a security the bill of lading, which they send to their correspondents with an account of the transaction, and a direction for the latter to remit the return proceeds to the merchant, through them. The correspondents sell the goods, and remit directly to the merchant a bill of exchange drawn upon the London firm for the full amount of the proceeds in the following form,—“Pay through your good selves, &c.” The bill of exchange is received by the assignees of the merchant, who becomes bankrupt before its arrival: Held, that they are bound to give it up, on being paid the difference between the proceeds of the sale, and the advance made to the bankrupt, and that the London and Indian firms might properly join in presenting a petition to have the bill delivered up.—*Exp. Mackey, re Morrison*, 136.

CERTIFICATE.

1. (*Conduct of bankrupt.*) Where all the creditors, except the petitioner, had signed the bankrupt's certificate, and they, on the day before it would have been allowed in due course of law, presented a petition to stay it on the ground that the amount of their debt, after deducting the value of the securities held by them, would turn the certificate, and that they had been involved in litigation and expense in establishing the validity of their securities; but it did not appear that the bankrupt was a party to such litigation, or had occasioned any delay to the petitioners; the Court refused to stay the certificate.—*Exp. Whitworth, re Cooke*, 133.

2. (*Staying—Statement of grounds.*) In a petition to be admitted to prove, and

that the certificate may be stayed in the meanwhile, it is not necessary to state that the debt will turn the certificate.—*Exp. Whitworth, re Mayor*, 164.

CONTEMPT.

(*Submission.*) Where a party took forcible possession of the bankrupt's effects whilst in the custody of the messenger, but finding he had done wrong gave up the possession again, the Court, on a petition to commit him for a contempt, only ordered him to pay the costs of the petition.—*Exp. Fletcher, re Proud*, 129.

EQUITABLE MORTGAGE.

1. (*Change of firm—Recognition of lien.*) Where the bankrupt deposited title-deeds with his bankers to secure future advances, and after a change in the partnership continued for six years the same mode of dealing with them, and the same running account: Held, that this was a tacit recognition of the deposit of the deeds with the new firm upon the same terms as with the old.—*Exp. Oakes, re Worters*, 234.
2. (*Parol evidence.*) Parol evidence admitted to increase the amount secured by the deposit, beyond the sum stated in a memorandum accompanying the deposit.—*Exp. Nettleship, re Burkill*, 124.

And see JURISDICTION, 2.

EVIDENCE. See EQUITABLE MORTGAGE; PRACTICE, 1, 2, 6.

JOINT AND SEPARATE ESTATES.

(*Competing fiats.*) The general rule that a separate fiat shall be annulled to make room for a joint one, acted on by the Court, though the separate estate was more important than the joint, and the other bankrupt intended to dispute his bankruptcy.—*Exp. Burdikin, re Mills*, 187.

And see PROOF.

JOINT STOCK COMPANY.

1. (*Debt from member to company.*) A joint stock company established under the 7 Geo. IV. c. 46, may prove for a debt due to the company from one of its members. See *Exp. Davidson*, 1 Mont. Dea. & D. 648.

The petition ought to allege that the company was established under the above statute.—*Exp. Wallis, re Drewry*, 201.

2. Same point decided same way.—*Exp. Cooper, re Young*, 1.

JURISDICTION.

1. (*Appeal as to adjourned proof.*) Where on appeal to Court of Review for rejection of proof it was a question, whether the proof had been rejected or only adjourned, and the Court thought that the proof ought to have been admitted, it ordered, without deciding the question of adjournment or rejection, the proof to be placed on the proceedings.—*Exp. Whitworth, re Mayor*, 158.
2. (*Dus execution of orders.*) The Court of Review has jurisdiction to entertain a petition complaining of an abuse in the execution of an order made for the sale of property under an equitable mortgage; but the petition must be that of a creditor, or party interested in the bankrupt's property, and who is also a party aggrieved.—*Exp. Columbine, re Whitehead*, 24.
3. (*Expunging.*) The commissioners have no jurisdiction to expunge a proof

which has been placed on the proceedings under an order of the Court of Review.—*Exp. Whitworth, re Mayor*, 164.

PARTNERSHIP. See JOINT STOCK COMPANY; JOINT AND SEPARATE ESTATES.

PLEADING.

(*Doubtful statement—Estoppel—Rehearing.*) A creditor having so framed his petition that his assent to a transaction on which he relied as a breach of contract, giving him a right to prove, though not stated, might be implied, and the Court having decided against him on the assumption of that assent, presented a petition of rehearing on the ground of surprise and inattention, and supported it by an affidavit that he had not in fact assented. The petition was dismissed with costs.—*Exp. Eyre, re Wright*, 84.

And see CERTIFICATE, 2; JOINT STOCK COMPANY, 1.

PRACTICE.

1. (*Copy of deposition.*) The Court will not on a petition by bankrupt to annul, order him a copy of the deposition upon which the adjudication was made, but it cannot be used against him without notice, and a copy verified by affidavit being given him by the opposing party.—*Exp. and re Abbott*, 64.
2. (*Evidence—Reading Examination.*) Held, that part of an examination taken before the commissioner could not be read even against the party at whose instance the examination had been taken. There was also another sufficient objection for want of notice.—*Exp. Smith, re Clarke*, 113.
3. (*New fiat—Change of direction.*) Where the bankrupt had carried on business in London, which was his last place of domicile, and had been also engaged in mining speculations in Cornwall, and had been subsequently living with a relation near Dover under a feigned name, a fiat that had been directed to Dover was ordered to be impounded, and the proceedings under it transferred to the commissioners in London, to whom a renewed fiat was ordered to be issued.—*Exp. Gregory, re Cave*, 92.
4. (*Opening fiat.*) Time for opening fiat not enlarged, on petition of bankrupt, to facilitate a composition by means of a trust deed.—*Exp. and re Drew*, 88.
5. (*Opening fiat—Attendance of Witnesses.*) Attendance of the witness at the opening of fiat, to prove the act of bankruptcy under 1 & 2 Vict. c. 110, s. 8, dispensed with.—*Exp. Bowman, re Skillman*, 90.
6. (*Reading deposition.*) *Semble*, that a respondent may read, in answer to the affidavit in support of the petition, the deposition before the commissioners of the party making such affidavit, giving the petitioner notice and a copy of the deposition; but the more regular course is to embody such deposition in an affidavit.—*Exp. Gem, re Rumsey*, 99.
7. (*Setting down petitions.*) The Court refused on the application of the bankrupt alone to set down to be heard on the same day a petition by him to annul and another petition for the same purpose by another party.—*Exp. and re Abbott*, 64.
8. (*Substitution of debt—Form of certificate.*) It is not necessary that the commissioner should certify that the debt of a creditor, proposed to be substituted for that of the petitioning creditor, has been incurred not anterior to the debt

of the petitioning creditor; if the Court is satisfied of the fact by other evidence.—*Exp. Pubery, re Proffit*, 184.

And see BILL OF EXCHANGE; CONTEMPT; PROOF, 1.

PRINCIPAL AND SURETY.

(*Promissory note—Necessity of demand.*) The rule that where a man engages to pay on demand the debt of another, no debt is due from him till demand has been made, does not apply to the case of a joint promissory note given by the principal debtor and another as his surety.—*Exp. Whitworth, re Mayor*, 158.

And see APPROPRIATION OF PAYMENT.

PROMISSORY NOTE. See PRINCIPAL AND SURETY.

PROOF.

1. (*Bankrupt creditor.*) Where a creditor becomes bankrupt, he must join with his assignees in the affidavit in proof of the debt. The affidavit of the assignees alone is not sufficient.—*Exp. Robson, re Amner*, 65.

2. (*Liability of firm for tort of one—Breach of contract—Substitution of securities.*) The customer of a bank agreed to lend to A., one of the firm, some railway bonds, which were kept in a box in the custody of the bank, upon such partner placing in the box, in lieu of such bonds, some certificates of shares belonging to him, no time being fixed for replacing the bonds. The exchange was accordingly made, but some time afterwards A., without the knowledge of the customer, substituted other securities in lieu of those he had deposited: Held, 1st, that this constituted a debt against the estate of the partner only, and not that of the firm; 2dly, that though no time was fixed for the replacement of the bonds, the abstraction of the certificates was a breach of the contract, constituting a proveable debt, and taking the case out of the authority of *Utterson v. Vernon*, 4 T. R. 570; 3dly, that the sum proveable was not the value of the certificates removed, but the value of the bonds at the time of removal; 4thly, that the customer was entitled to avail himself of the substituted securities and to prove for the difference.

In the same case, where the customer had sent the firm other railway bonds, upon having other securities placed in his box in their stead, with an engagement to replace the bonds *at or within* three months, at the request of the customer, that time having elapsed without the replacement being made, but without any request to that effect by the customer, and the firm having then become bankrupt: Held, that there was no breach of contract previous to the bankruptcy, and consequently no proveable debt, but that the customer was entitled to avail himself of the substituted securities.—*Exp. Eyre, re Wright*, 66.

REPUTED OWNERSHIP.

1. (*Policy of insurance.*) Although no notice is given to an insurance office of the deposit of a policy, *semble*, that it is not a case of reputed ownership, unless some evidence is offered that the bankrupt was still reputed to be the owner. Where the policy is effected by the bankrupt with a mutual insurance company, in which all the insurers are considered as copartners, the company will be considered to have notice.—*Exp. Rose, re Ross*, 131.

2. (*Same.*) The omission to give notice to the insurance company of the deposit

of the policy is not of itself conclusive evidence that such policy was in the reputed ownership of the bankrupt.

Reputed ownership is a question of fact.—*Exp. Smith, re Styan*, 213.

3. (*Same—What is notice.*) Held, that two policies in a company formed upon the principle of mutual assurance, so as to make all the holders of policies partners, which had been deposited by bankrupt as a security, without notice of the deposit being given to the company, were not within the reputed ownership; the Court observing, that there was *no evidence* of the bankrupt being reputed owner.—*Exp. Cooper, re Young*, 1.
4. (*Shares in joint stock company.*) Held, that the shares of a bankrupt in such a company, upon which shares the company had a lien for advances made to the bankrupt in virtue of the rules of the company, were not within the reputed ownership of the bankrupt so as to defeat the lien of the company.—*Exp. Cooper, re Young*, 1.

And see SPECIAL CASES.

SET-OFF.

(*Between two accounts with banker—Injunction.*) Where parties who were commissioners under the same act for two different purposes, kept with the same banker, who was their treasurer, two accounts relating respectively to the two different purposes, and one of such accounts was overdrawn at the time of the banker becoming bankrupt, while on the other a balance was due to the commissioners; it was held that the assignees could not sue for the balance due on the overdrawn account, but that the commissioners might set it off against the other and prove for the balance, and the assignees were restrained from proceeding with their action, though the set-off might have been pleaded at law.—*Exp. Pearce, re Langmead*, 142.

SPECIAL CASE.

(*Matter of fact or of law—Transfer of account.*) Where A., a London merchant, who had for some time stood as surety to a house in New York for the balance that might be due to them from a house in Virginia with whom A. corresponded, entered into partnership with another, and the new firm then wrote to the house in New York, proposing themselves to continue as sureties for the Virginia house and requesting that the account between A. and the New York house should be transferred to an account between the new firm and them; and the New York house assented to the proposal generally, "hoping at the same time that the old account between them and A. would first be settled," and afterwards drew upon the new firm. The Lord Chancellor held, that the question of whether the New York house had accepted a credit on the new firm in lieu of the credit on A., was one of fact and therefore not a fit subject for a special case, but he gave it as his opinion at the same time that there had been such acceptance, agreeing with the decision of the Court of Review.—*Exp. Jackson, re Warwick*, 146.

Special Cases.

1. CONSTRUCTION OF WILL.—(*Vesting of legacy.*) Where a legacy was given to a daughter, "to be secured on land until paid as thereafter mentioned, and the payment was to be upon the marriage, and the daughter was in the mean-

while to allow the legacy to remain in the hands of the executors, who were also devisees of the land charged with the legacy: Held, that the legacy was vested.—*Hudson v. Forster*, 177.

2. JOINT AND SEPARATE ESTATES.—(*Proof by creditor holding security*;) Held in a case, upon which the Court of Review had given no judgment, that a creditor having a security from a partnership firm over part of the joint estate, but who had also a joint and separate covenant from the partners for the payment of the debt for which the security was given, might prove against each separate estate for the whole amount, without giving up his security. No order as to costs.—*Exp. Shepherd, re Plummer*, 204. (See S. C. ante, vol. i. p. 101.)
3. REPUTED OWNERSHIP.—(*Policy of assurance*—2 & 3 Vict. c. 29.) Where a policy had been deposited by bankrupt as a security some time before his bankruptcy, but notice of the deposit had not been given to the company till after the act of bankruptcy, the Lord Chancellor, without deciding the question as to the necessity of notice, held that the transaction, as made up of the deposit and notice, was within the protection of 2 & 3 Vict. c. 39, as a *bond fide* transaction without notice before the date of the fiat.—*Re Styau*, 219.
4. TEA TRADE.—(*Special custom*.) Teas are sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as a pledge for full payment with the vendor, who in case of non-payment is at liberty to resell and charge the loss to the original purchaser. The purchase money is not paid at the appointed time; the purchaser becomes bankrupt; and the vendor, having sold part of the teas before the fiat and the rest afterwards, gives the estate credit for the clear proceeds of the sales: Held, that although there was no delivery of the goods, the original sale was a binding contract within the Statute of Frauds, and that the vendors were entitled to prove for the residue of the purchase money unsatisfied by the sale.—*Exp. Moffatt, re Tate*, 170.

TRADING.

- (*Attorney—Money broker—Scrivener*.) Any person receiving other men's monies or estates into his hands or custody for the purpose of making a livelihood by the profits arising from the money so deposited, whether he be properly a "scrivener" or not, is a trader within the bankrupt laws; as in this case an attorney, who was in the habit of lending out other men's monies on mortgage, charging a commission to the borrower.—*Exp. Gem, re Rumsey*, 99.
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ADMIRALTY.

[Containing 1 Robinson, Part 1.]

APPEAL. See PRACTICE, 1.

BOTTOMRY.

1. (*Bond in substitution of lienwit hout bond.*) Where by the law of the country in which the repairs were made, the party, making the advances required for the purpose, had a lien on the ship for such advances, without any bottomry bond, and the bondholder had in this case taken upon himself the responsibility of repairing the ship, and made some advances for that purpose before the bond in question, and the evidence of any previous agreement for a bond was very slight, the Court advertg to the law of the country giving a lien, and to the improbability of the bondholder abandoning that lien without an equivalent being secured, upheld the bond.—*Vibika*, 1.
2. (*British ship in British port.*) The validity of a bottomry bond does not depend upon the residence of the owner, but on the necessity of the case; and in a case where the owner of a ship, residing in Scotland, had become insolvent, a bond given after notice of that insolvency for repairs of the ship, which was then at Plymouth, was held good.—*The Trident*, 29.
3. (*Construction of bond—Extrinsic evidence—Rate of interest.*) The Court refused to admit extrinsic evidence for the purpose of showing that a bond was intended to be given on bottomry.
It is not essential to the validity of a bond as a bottomry bond that it should bear maritime interest, but the fact of its bearing only the ordinary rate is a reason for supposing that sea risk was not contemplated, and therefore that there was no bottomry.—*The Emancipation*, 124.
4. (*Interest on bond.*) Where the legal holders of an overdue bond of bottomry are resident abroad and have no agent in this country, interest upon such bond will not be decreed prior to the arrival of a power of attorney authorizing the receipt of the principal.—*New Brunswick*, 28.
5. (*Jurisdiction—Agreement.*) The Court held that it had jurisdiction to enforce an agreement for bottomry without bond.—*The Aline*, 111.
6. (*Jurisdiction—Putting to sea.*) The Court held, that it had jurisdiction to enforce a bond, though the vessel had not put to sea since its execution.—*S. C.*

COLLISION.

1. (*Double remedy.*) In a case of collision where the value of the vessel condemned was insufficient, the Court, without giving an opinion as to whether the personal remedy was taken away by the 53 Geo. 3, c. 159, refused to engraft a personal action for the excess upon the action in rem.—*The Hope*, 154.

2. (*Evidence.*) In cases of collision the confession of the master of the vessel proceeded against is admissible as evidence for the other party, and may be pleaded in the libel on his behalf.—*The Manchester*, 62.
3. (*Insufficiency—Costs.*) Where the proceeds of the vessel sold under a decree in a cause of collision were insufficient to answer the damage, the Court made a personal decree against the owner for the costs of suit.—*The John Dunn*, 159.
4. (*Jurisdiction—Foreign vessels.*) The Court held that it had jurisdiction in a case of collision happening between two foreign vessels, on the high seas, not far from the English coast, and where the vessel doing the damage afterwards came into an English port where she was arrested.—*The Johann Friedrich*, 35.
5. (*Newcastle Pilot Act.*) The provisions of this act, the 41 Geo. 3, c. 86, make it compulsory on a foreign vessel proceeding up the Tyne to take a pilot on board; and consequently upon general principles, and independently of the general Pilot Act, 5 Geo. 4, c. 55, such vessel is not liable for damage done by her through the default of such pilot.—*The Maria*, 95.
6. (*Thames Pilot Act—Onus Probandi.*) Where damage by collision is done by a vessel under charge of a pilot, acting under the 6 Geo. 4, c. 125, s. 14 (an act applicable to the navigation from Dungeness up the Thames and Medway), unless such damage be shown not to have happened through the default of the pilot, the owners are exempt from liability. So held upon a full review of of the cases overruling the case of the *Christiana*, 2 Hagg. 183.
But the onus of showing that the damage was not caused by the misconduct or neglect of the master or crew lies upon the owners of the vessel.—*The Protector*, 45.
7. (*Joint default—6 Geo. 4, c. 125.*) The exemption from liability conferred by this act does not apply where the damage was occasioned by the joint default of the pilot and the crew.—*The Diana*, 131.

COSTS. See COLLISION, 3.

EVIDENCE. See COLLISION 2; PRACTICE, 1.

JURISDICTION. See BOTTOMRY 5, 6; COLLISION, 4; PRACTICE, 2, 4; WAGES, 1, 3, 4.

LIEN.

(*Conflicting liens—Bottomry—Collision.*) In a case where after damage done by collision, advances were made upon bottomry for the repairs of a ship, without notice of any claim against her for the damage she had done; but such ship, being so repaired, was arrested by the owner of the ship which had been damaged, and he succeeded in establishing his claim against her for damages: Held, that such claim extended only to the value of the ship before repairs done, and that the additional value arising from such repairs belonged to the bondholder. But the Court said it would have been otherwise if the collision had happened after the repairs done, in which case the whole value of the ship so repaired would be liable to make good the damage by collision.—*The Alne*, 111.

PILOT. See SALVAGE, 2.

PILOT ACTS. See COLLISION, 5, 6, 7.

POSSESSION.

(*Legal and equitable interests.*) In adjudications upon the possession of a vessel, the Court looks to the legal title in preference to the equitable interest of the different claimants, and accordingly it preferred the title of the trustees of a will to that of the legatees, under that will, of shares in a vessel.—*The Valiant*, 64.

PRACTICE.

1. (*Appeal, new evidence.*) In appeals to the Court of Admiralty from the awards of magistrates, the appellant may commence proceedings by an act or affidavits containing fresh evidence, but he does so on pain of paying costs if the evidence shall appear to have been introduced without sufficient cause.—*The Thomas Wood*, 18.
2. (*Parties out of jurisdiction.*) Where the owners were resident in Ireland, which is out of the jurisdiction of the Court, the Court refused to issue letters of request, there being no precedent for it, but made the decree for their answer in the usual form.—*The Manchester*, 93.
3. (*Proceeding by plea and proof.*) In a proceeding by plea and proof a libel having been admitted on behalf of the promoters of the suit, the responsive allegation of the owners of the vessel proceeded against, directed to stand over till the personal answers of those owners had been given in.—*The Manchester*, 93.
4. (*Variation of decrees—Jurisdiction.*) The Court of Admiralty possesses the same power of varying its decrees which belongs to other Courts, but such variation should be confined to the correction of an error arising from want of knowledge or information on a particular point, and the error must be brought before the Court as soon as possible.—*The Monarch*, 21.

And see COLLISION, 1 ; SALVAGE, 4.

SALVAGE.

1. (*Agreement by master.*) In cases of salvage the master of the salving vessel may bind his own interest, and the interest of his employers, by an agreement with the owner of the vessel saved as to the quantum of salvage to be paid, but such agreement will not be conclusive upon the rest of the crew if made without their concurrence.—*The Britain*, 40.
2. (*Pilots.*) A pilot held entitled to salvage for bringing in a damaged vessel.—*The Frederick*, 16.
3. (*Special custom—Whale fishery.*) Where a special custom was alleged that vessels engaged in the whale fisheries were bound to render each other gratuitous assistance, the Court, without deciding on the validity of such a custom, gave salvage for the rescue of a vessel frozen up, on the ground that the custom was founded on the obligation of mutual assistance, and could not be pleaded on behalf of a vessel incapable of rendering such assistance.—*The Swan*, 68.
4. (*Sufficient tender—Costs.*) The Court announced its intention to give for the future costs in cases of salvage where a sufficient tender had been made, but in this case it gave no costs, though the tender was sufficient.—*The Emu*, 159.

5. (*Treasury bounties.*) The Court held that bounties given by the Treasury with the apparent but not express intention of assisting the rescue of vessels engaged in the whale fisheries, might be pleaded in diminution of salvage.—*The Swan*, 68.

WAGES.

1. (*Discharge before service.*) A seaman hired for a voyage, though discharged before the voyage began, may sue for his wages in the Admiralty Court, if the voyage is afterwards proceeded in.

If the voyage is abandoned, *semble*, that his remedy is by action at law on the contract.—*The City of London*, 88.

2. (*Forfeiture for misconduct.*) Misconduct is not a ground for diminution of wages, but if allowed as a plea at all, it goes to the forfeiture of the whole.

Such misconduct only is a ground for forfeiture of wages as makes the discharge of a seaman necessary to the safety of the ship.

In cases where misconduct is set up against a claim for wages the Court will admit evidence of misconduct of the master and officers on other occasions.—*The Blake*, 73.

3. (*Jurisdiction—Foreign seamen.*) The Court has jurisdiction on a claim of wages by foreign seamen for service in a foreign ship, without the consent of the consul or minister of the country to which such seamen and vessel be long; but the Court will not exercise that jurisdiction without notifying the case to such consul or minister, and considering such objection as he may think proper to make. In this case the Russian consul, in assenting to the exercise of the jurisdiction in this particular instance, objected to its assertion generally over Russian vessels, without his sanction.—*The Golubchick*, 152.

4. (*Jurisdiction—Special agreement.*) The Court of Admiralty has no jurisdiction, where the claim for wages is founded not on the usual mariner's contract, but on a special agreement.—*The Mona*, 137.

WHALE FISHERY. See SALVAGE, 3.

HOUSE OF LORDS.

[Containing Cases in 7 Clark and Finnelly, Parts 1 and 2 ; and 1 West, Part 3, omitting Cases noticed in former Digests.]

APPEAL.

1. (*Competency—Appeal by one not a party.*) An order of the Court of Chancery, setting aside a purchase made under a decree in a cause, may be brought under review of the House of Lords by the purchaser, although not a party to the cause.—*Bailey v. Maule*, (note), C. & F. 121.
2. (*Competency as to order on award.*) An order of the Court of Chancery on an award, made between parties, upon a submission to a reference which was made a rule of Court, according to act of parliament (10 Will. 3), no bill being filed, is not subject-matter of appeal to the House of Lords.—*O'Sullivan v. Hutchins*, (note), C. & F. 85.
3. (*Competency—As to order on extent.*) An order made by the Court of Exchequer on a report by the remembrancer, under a reference to him in the matter of an extent, no bill being filed, is not subject to an appeal to the House of Lords.—*Wall v. Attorney-General*, (note), C. & F. 81.
4. (*Competency—Charities belonging to corporations—Jurisdiction.*) *Quære*, whether orders of the Court of Chancery relating to charities, made by virtue of the 5 & 6 Will. 4, c. 76, alone are subject to appeal to the House of Lords.
It was held, that an order made under the above act, and also under the 53 Geo. 3, c. 101, was subject to such appeal.—*Bigbold v. Springfield*, C. & F. 71.
5. (*Competency—Charities—43 Eliz. c. 4.*) A decree made by the Lord Chancellor upon appeal to him from a decree made by commissioners by virtue of the act 43 Eliz. c. 4, for charitable uses, is subject to appeal to the House of Lords.—*Almsmen of Eastham v. Lady Kempe*, (note), C. & F. 101.
6. (*Same.*) Similar appeal entertained.—*Warner v. North*, (note), 101.

ARRANGEMENT.

(*Effect of partial compromise.*) Where after a bill filed to set aside leases, and also a sale of the property subject to such leases, an arrangement was come to between the plaintiff and the purchaser, that the latter should give up all claim in consideration of a sum of money, and it was stated by counsel that in consequence of such an arrangement, no judgment was asked against the purchaser ; the House of Lords held, that such an arrangement, amounting to an admission of title in the plaintiff, which gave him an interest in setting aside the leases, he was still entitled to prosecute his suit for that object, and that the bill had been improperly dismissed by the Court below.—*Sheeby v. Lord Muskerry*, C. & F. 1.

AWARD. See APPEAL, 2, 4 ; CHARITY ; FRAUD ; MUNICIPAL CORPORATION ACT.

DEED.

(*Execution of deed by notary.*) A person labouring under a great defect of vision may, although not absolutely incapable of writing, execute a deed by the intervention of notaries, and such execution shall be good under the Scotch acts of 1540 and 1579.—*Reid v. Baxter*, C. & F. 261.

EXTENT. See APPEAL, 3.

FRAUD.

(*Dealing with married woman.*) Where an award was made and accounts were passed between a married woman, representing herself as sole, and another party who knew that she was married, the account and award were set aside as void against her and her children.—*M'Can v. O'Ferrall*, W. 593.

JURISDICTION. See APPEAL, 2, 3, 4, 5, 6.

INFANT.

1. (*Right to make a new defence.*) It was considered by the Lord Chancellor to be a matter of great doubt whether one of several defendants, who was an infant at the time of the decree, but who had an interest similar to that of the adult defendant, was properly allowed by the Court below to make a new defence on coming of age.—*Malone v. Malone*, W. 637.
2. (*Trial of issue.*) Where all of several defendants but one, who was an infant, had consented that an issue ascertaining the character of the plaintiff should be first directed before deciding the question of law which the plaintiff would be entitled to try if he held the character in which he sued, and the infant coming of age and having obtained leave to put in a new answer and make a fresh defence, appealed against the order directing the issue, the appeal was dismissed.—S. C.

ISSUE.

(*Form of heir male.*) Where a claim was made by a plaintiff, as "heir male" of a particular person: Held, that an issue directed as to whether he was "heir at law" of such party was in the proper form.—*Malone v. Malone*, W. 637.

And see INFANT, 2.

LANDLORD AND TENANT.

(*Irish lease—Trees.*) By force of the Irish statutes, 5 & 6 Geo. 3, c. 17, and 23 & 24 Geo. 3, c. 39, a tenant having twelve years or more of his lease to run, is entitled to the property of any trees he may plant. In the case of a demise "reserving all wood and underwood, timber and timber-trees, standing, growing, or being on the demised premises, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same:" Held, that this clause secured to the owner of the inheritance the benefit of such trees as were upon the premises at the time of the demise, but did not transfer to him the property in trees planted under the provisions of the statutes above referred to, the property in such trees being vested in the lessee.—*Galway v. Baker*, W. 467.

LEGITIMACY.

(*Scotch marriage.*) A child born in Scotland of parents unmarried at his birth, who afterwards marry in Scotland, though legitimate according to the laws of that country, is not so here, so as to be capable of inheriting land.

The opinion of the judges was taken, and the decision agreed with it, Lord Brougham not assenting.—*Doe d. Birthwistle v. Vardill*, W. 500.

LIGHT.

(*Period of enjoyment.*) Held, affirming the judgment of the Exchequer Chamber in Error, that under 2 & 3 Will. 4, c. 71, ss. 3, 4, a party might maintain an action for the obstruction of light, though the twenty years' enjoyment had been interrupted for thirty-three days immediately previous to the expiration of the twenty years.

In order to destroy the right, the interruption must have been for one whole year, and acquiesced in by the party aggrieved.—*Flight v. Thomas*, W. 671.

MARRIED WOMAN. See FRAUD.

MUNICIPAL CORPORATIONS ACT.

(*Charity vested in corporations—Appointment of trustees.*) By act 5 & 6 Will. 4, c. 76, s. 71, it is enacted, that all the estate and interest of such bodies corporate, or members thereof, as were seised or possessed of any real or personal estate in trust for charitable uses, should, in respect of such uses and trusts, continue in the persons who at the time of passing the act (1835) were such trustees, until the 1st day of August, 1836, or until parliament should otherwise order, and should thereupon utterly cease and determine: provided that if parliament should not otherwise direct on or before the said 1st of August, the Lord Chancellor or Lords Commissioners of the Great Seal should make such orders as they should see fit, for the administration, subject to such charitable uses and trusts as aforesaid, of the said charity estates and funds. Parliament did not pass any subsequent act on the subject before the 1st of August, 1836.

Held, that the administration of the charity estates and funds did not continue in the persons so described after the 1st of August, 1836; and that it was competent to the Lord Chancellor, after that day, to make orders for the appointment of new trustees for their administration.—*Bignold v. Springfield*, C. & F. 71.

PATENT. See APPEALS ON REPORTED CASES.

PEERAGE.

(*Writ of summons—Evidence of sitting.*) A summons to parliament, and a sitting under it, is evidence of a title to a peerage descending to the heirs of the body, including females; so likewise is it evidence of a similar title, where there have been several summonses, both prior and subsequent to a sitting in parliament, and a sitting in parliament, though no sitting under a summons, has been proved, proof being adduced that during the period of that sitting there were no writs of summons in existence.—*Barony of Hastings*, W. 621.

PLEADING.

(*Multifariousness.*) *Semble*, that a bill to set aside leases, and a sale subject to them, is not multifarious.—*Shoeby v. Lord Muskerry*, C. & F. 1.

POWER.

(*Appointment for benefit of donees—Cases for inquiry.*) A father being tenant for life of a certain estate held upon lives, with power of appointment amongst one or more of his children, by deed of the 14th January, 1804, appoints to his son, in tail male. By deed of the 18th January, 1804, the father and son, in consideration of 1600*l.*, to be applied in paying interests of debts upon the estates, and of fines due for the renewal of the lives on the estates, demise part of the estate for the lives therein named, and for lives which might afterwards be added. By lease and release of the 10th and 11th December, 1807, in consideration of the debts paid by the father for the son, the son reconveys to the father the estate which had been appointed to the son: Held, that from the circumstances of the two first deeds being executed nearly at the same time, of the father's debts being

provided for out of the estate, and of the son's restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds, that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment. Decree reversed, and inquiry directed.—*Jackson v. Jackson*, W. 575.

PRACTICE.

1. *Defect of process cured by acquiescence.*) Held, (affirming the judgment of the court of sessions,) that a defender whose name has been omitted *per incuriam* from the conclusions of the summons, is not to be permitted to have recourse to that omission as a fatal objection to the whole process, after his defences preliminary and on the merits have been repelled.—*Creighton v. Rankin*, C. & F. 325.
2. *(Priority of inquiry.)* Where a claim is made involving two questions, one of fact, as whether plaintiff fills a particular character, the other of law, as whether having that character he would be entitled, it is a matter of discretion which shall be first inquired into; and where the Court below had first directed an issue as to whether a plaintiff was the heir of a particular person, in which case he would have been entitled under the will of another person, the Court held that the discretion was properly exercised.—*Malone v. Malone*, W. 637.

And see REHEARING.

PRINCIPAL AND SURETY.

(Scotch and English law—Default of obligees.) The law as to the liabilities of a surety upon his bond is the same in Scotland as in England; namely, that the surety is not discharged unless by a variation in the positive contract between the obligees and the principal. Accordingly in the case of an action brought upon his bond against the surety of the treasurer of a road trust, it was held no sufficient defence, that the trustees of the road had at several prior audits of the treasurer's accounts allowed him, contrary to their duty, to retain in his hands balances far exceeding the amount allowed by the bond, without requiring payment of him, or giving notice to the surety.—*Creighton v. Rankin*, C. & F. 325.

REHEARING.

(Enrolment.) In questions respecting the enrolment of decrees the Courts exercise a discretionary power, but regulated by precedent. And in a case where it was doubtful whether a decree had been enrolled or not, and the Court for the purpose of rehearing the case had made an order vacating the enrolment, (which assumed of course that there had been an enrolment,) and an appeal was presented against the decree made on rehearing, the House of Lords, though admitting the irregularity of the proceeding, in vacating the enrolment, yet rather than put the party to the necessity of presenting a new appeal against the decree made at the original hearing, decided the questions at issue on the appeal as it stood.—*Sheeby v. Lord Muskerry*, C. & F. 1.

ROAD ACTS.

(Construction of Scotch Road Acts.) On the true construction of the general Turnpike Road Acts for Scotland (4 Geo. 4, c. 49, and 1 & 2 Will. 4, c. 43), the clerk appointed by trustees of district road under a local act, may, as their representative, sue and be sued on their account in his own name; and he is the proper person to bring an action against their treasurer's sureties.—*Creighton v. Rankin*, C. & F. 325.

SCHOOL.

(Public or private—Removal of master.) A royal charter of incorporation does not

of itself make a school a public one, so as to deprive the trustees of any discretionary power of removing the schoolmaster, which the rules of the establishment may give them, but which in a public foundation a similar mode of appointment would not give them.—*Gibson v. Ross*, C. & F. 241.

STATUTE OF MERTON.

(*Legitimacy.*) The statute of Merton, and the old law as to general and special bastardy, and the jurisdiction by which each was tried, fully discussed. The children born before marriage, of parents who afterwards marry, were it seems legitimate by the canon law, and bastards by the common law, a difference which was the subject of much contention between the clergy and civil power, and the occasion of the celebrated saying, "*Nolimus leges Angliæ mutari.*"—*Doe v. Birthwistle v. Vardill*, M. 500.

TRUST.

(*Trust-deed—Retrospective charge.*) Held, reversing the decision of the Court of Chancery in Ireland, that a conveyance by debtor, in trust to raise money for payment of his debts, created no interest in the creditor; and where the plaintiff had advanced money to the trustee, to be applied, as it was, in payment of the debts of the grantor, and there were subsequent negotiations to have the money secured by the exercise of a power vested in such trustee, which power fell to the ground by the death of the grantor, who was only tenant for life, and there was, by letters in reality subsequent to the advance but dated before it, an agreement to make the money advanced a first charge on the life estate, and the Court of Chancery in Ireland had held that the life estate was charged from the time of the advance, and had given an account against the trustee accordingly, the decree was reversed, and the bill dismissed with costs up to the hearing.—*La Touche v. Earl of Lucan*, W. 478.

WILL.

(*Construction—Revocation—Double residuary bequest.*) Mr. Charles Yorke, by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, and after her death to transfer the residue to Sir Charles Douglas. In a codicil, after giving specific and pecuniary legacies, there was the following clause: "All the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my wife, equally to be divided between them." Held, that the residue of the testator's property passed under the residuary clause of the codicil, which revoked the gift of the residue bequeathed by the will;—Lord Lyndhurst and Lord Brougham concurring; the Lord Chancellor dissentiente, and being of opinion that nothing passed under the residuary clause of the codicil, the whole of the residuary property being disposed of by the will.—*Earl of Hardwicke v. Douglas*, W. 555.

APPEALS ON REPORTED CASES.

[*Kay v. Marshall*, 1 Beavan, 534; L. M. 49.]

(*Patent.*) The decision of the Court below, that an improvement for fixing at a shorter distance the rollers with which flax was spun, rollers with a variable distance having before been known, was not such an alteration as would support a patent.—W. 682.

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ABSTRACT OF PUBLIC GENERAL STATUTES.

(5 VICT. SESS. 2.—*Continued.*)

- CAP. 9.—An Act to authorise the advance of Money out of the Consolidated Fund to a limited amount for carrying on Public Works and Fisheries, and Employment of the Poor, and to amend the Act authorizing the Issue of Exchequer Bills for the like purposes. [22nd April, 1842.]
- CAP. 10.—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and to extend the Time limited for those purposes respectively until the Twenty-fifth day of March, One thousand eight hundred and forty-three; and for the Relief of Clerks to Attorneys and Solicitors in certain cases. [22nd April, 1842.]
- CAP. 11.—An Act for appointing Commissioners to inquire as to the Issue, Receipt, Circulation, and Possession of certain forged Exchequer Bills. [22nd April, 1842.]
- CAP. 12.—An Act for punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters. [22nd April, 1842.]
- CAP. 13.—An Act for the Regulation of Her Majesty's Marine Forces while on Shore. [22nd April, 1842.]
- CAP. 14.—An Act to amend the Laws for the Importation of Corn. [29th April, 1842.]
- CAP. 15.—An Act to impose an Additional Duty on Spirits, and to repeal the Allowance on Spirits made from Malt only in Ireland. [29th April, 1842.]
- CAP. 16.—An Act to continue until the End of the Session of Parliament next after the Thirty-first day of July, One Thousand eight hundred and forty-four, certain of the Allowances of the Duty of Excise on Soap used in Manufactures. [13th May, 1842.]
- CAP. 17.—An Act for preventing, until the First Day of May, One thousand eight hundred and forty-five, Ships clearing out from any Port in British North America, or in the Settlement of Honduras, from loading any part of their Cargo of Timber upon Deck. [13th May, 1842.]
- CAP. 18.—An Act to explain and amend the Acts regulating the Sale of Parish Property; and to make further Provision for the Discharge of Debts, Liabilities, and Engagements incurred by or on behalf of Parishes. [13th May, 1842.]
- S. 1 recites doubts raised on the construction of the 5 & 6 W. 4, c. 69, s. 1, and enacts, that all sales and dispositions of lands, buildings, &c., by overseers and acting guardians of dissolved incorporations, to unions formed under the 4 & 5 W. 4, c. 76, and 7 W. 4 & 1 Vict. c. 50, shall be taken to have been valid.
- S. 2. The stat. 5 & 6 W. 4, c. 69, s. 3, shall be deemed to have authorised the sale, &c., by the guardians of new unions, of parish property within the union; and in the case of sale, &c. of property of a dissolved union, to apply to a majority of its last acting guardians: proviso, that this shall not apply to render valid the sale, &c. of property bequeathed by way of charitable donations, nor to dispense with the consent of rate payers and owners of property, except in case next provided.
- S. 3. Provisions for sale, &c. of property belonging to several parishes: proviso, that no trustee shall be required to join in any conveyance of parochial property.

S. 4. The provisions of 1 & 2 Vict. c. 25, for the payment of debts out of the produce of the sale of parochial property, extended to any recognized *bonâ fide* debts.

S. 5 empowers the Poor Law Commissioners, on receipt of a parochial request, to order payment of the aforesaid debts, out of the poor rates.

S. 6 empowers overseers, if so authorised by a resolution of the rate payers, &c. to borrow money for the payment of such debts, and charge the same upon the poor rates.

S. 7. Provision for the discharge of bonds given under the 22 G. 3, c. 83.

S. 8. Payments made in respect of debts not legally charged on the rates, or provided for under this act, declared illegal, and to be disallowed.

S. 9. Interpretation clause.

CAP. 19.—An Act to empower the Commissioners of Her Majesty's Woods to form a New Opening from Knightsbridge Road into Hyde Park, and a New Opening from High Street, Kensington, into an intended New Road across the Palace Green, and for annexing a Piece of Extra Parochial Ground in the Royal Garden to the respective Parishes of St. Mary Abbots, Kensington, and St. Mary, Paddington, in several Portions. [13th May, 1842.]

CAP. 20.—An Act to extend an Act passed in the Fourth and Fifth Years of Her present Majesty, for enabling Her Majesty's Commissioners of Woods to purchase certain Lands in Victoria Park. [13th May, 1842.]

CAP. 21.—An Act for raising the sum of Nine Millions One Hundred Thousand Pounds by Exchequer Bills, for the Service of, the Year One Thousand eight hundred and forty-two. [13th May, 1842.]

CAP. 22.—An Act for consolidating the Queen's Bench, Fleet, and Marshalsea Prisons, and for regulating the Queen's Prison. [31st May, 1842.]

S. 1. The Queen's Bench Prison to be called the Queen's Prison, and to be the only prison for debtors, bankrupts, &c. instead of the Queen's Bench, Fleet, and Marshalsea Prisons: proviso, that until the removal of the prisoners from the Fleet and the Marshalsea, they may be lawfully detained there, subject to all the rules now in force.

S. 2. Warden of the Fleet and keeper of the Marshalsea to certify a list of the prisoners in their custody, with the causes of commitment, within a month after the passing of this act; and as soon afterwards as the Queen's Prison can be made ready, the prisoners to be removed there by warrants of the Lord Chief Justice of the Queen's Bench, and such removal shall not be an escape.

S. 3. All the offices of the Fleet and Marshalsea Prisons thenceforth abolished.

S. 4. Provisions for claims to compensation by officers whose offices are abolished.

S. 5. Salaries now paid out of the Civil List to be retained as part of the Consolidated Fund.

S. 6. Discontinued prisons declared to be vested in the Crown.

S. 7. All enactments in force respecting the Fleet and Marshalsea Prisons, except where altered by this act, to apply to the Queen's Prison.

S. 8. Sums payable for the relief of poor prisoners, to the Treasurer of the County of Surrey, and Chamberlain of the City of London, under 53 G. 3, c. 113, to be paid to the keeper of the Queen's Prison.

S. 9 repeals so much of 53 G. 3, c. 113, as provides for the administration of the relief to prisoners in execution, and accounting for the monies received for that purpose: and the keeper of the Queen's Prison to account for such monies as the Treasury shall direct.

S. 10. Provisions for the appropriation of charitable gifts and bequests.

S. 11. All fees and gratuities paid by prisoners abolished, and all officers exacting any to be guilty of a misdemeanor.

S. 12. The liberty of the rules abolished, and all prisoners to be confined within the walls, and their being suffered to go beyond them to be deemed an escape. Exception, allowing the keeper to grant the rules for not more than twelve months to prisoners now in the enjoyment of the liberty of the rules of the Queen's Bench or Fleet Prison.

S. 13. No fees or stamp duties to be paid on securities for granting liberty of rules to such Fleet prisoners.

S. 14 provides for the removal of lunatic prisoners to Bethlehem Hospital; and,

S. 15. For the removal of prisoners in case of contagious disease or other emergency.

S. 16. Rules for the government of the Queen's Prison to be made by the secretary of state.

S. 17. Provision for the classification of prisoners.

S. 18 restricts the supply of food, liquors and necessaries to prisoners, except as allowed by the rules.

S. 19. Inquests within the prison to be held before the Coroner of London.

S. 20. Clerk of the papers of the Queen's Prison empowered to take affidavits of prisoners.

S. 21 repeals so much of 27 G. 2, c. 17, as requires the Marshal to keep the prison in repair.

S. 22. provides for the appointment and removal of officers by the secretary of state; and

S. 23. For the appointment of tipstaffs by the Lord Chancellor, Lord Chief Justice, and Lord Chief Baron.

S. 24. Salaries to officers.

S. 25. Provision for payment of salaries.

S. 26. Salaries and allowances to be defrayed out of the Consolidated Fund.

S. 27. Officers of the Queen's Prison to be within the provisions of 4 & 5 W. 4, c. 24.

S. 28. Act may be repealed or amended this session.

CAP. 23.—An Act to continue until the Thirty-first Day of July one thousand eight hundred and forty three and to the end of the then Session of Parliament the several acts for regulating Turnpike Roads in Ireland. [31st May, 1842.]

CAP. 24.—An Act for improving the Dublin Police. [31st May, 1842.]

CAP. 25.—An Act to repeal the present and impose and allow new countervailing Duties and Drawbacks of Excise on Mixtures and Preparations made with Spirits, when removed from or into England, Scotland or Ireland respectively, and to suspend for a limited Time so much of an Act of the present Session as repeals the allowance on Spirits made from Malt only in Ireland. [31st May, 1842]

CAP. 26.—An Act to alter and amend the Law relating to Ecclesiastical Houses of Residence. [31st May, 1842.]

S. 1. Episcopal houses may in certain cases be taken down and sold, or may be rebuilt or altered, under the authority of the Ecclesiastical Commissioners; and the provisions of 6 & 7 W. 4, c. 77, s. 1, made applicable thereto.

S. 2. Commissioners to state their reasons for the alteration.

S. 3. Repeal of the 2 & 3 Vict. c. 18, except as to subsisting mortgages.

S. 4. Provisions for supply of deficiency in bishop's income by the effecting of mortgages, &c.

S. 5. empowers chapters, deans, and canons, to purchase episcopal houses contiguous to cathedrals, and alter, or take down and rebuild them. Provisions of 3 & 4 Vict. c. 113, s. 59, made applicable thereto.

S. 6. Episcopal houses so purchased may be made the deanery or a canonical house.

S. 7. Provisions of 4 & 5 Vict. c. 39, s. 18, respecting the disposal of canonical houses, to apply to all such houses.

S. 8 defines other provisions of the 3 & 4 Vict. c. 113, s. 68, and extends them to this act.

S. 9. Certain fixtures and articles of furniture in any house sold or taken down may be sold or removed to another house.

S. 10. Certain articles to be deemed freehold fixtures.

S. 11. Provisions for insurance of houses of residence purchased, built, &c., under this act.

S. 12. Powers to corporations and persons under legal disability to sell lands &c., for any of the purposes of the former acts or this act; and provisions for the application and investment of the purchase money.

S. 13. Restriction on the mortgaging of benefices augmented under 3 & 4 Vict. c. 113, except with consent of the ecclesiastical commissioners.

S. 14. Provisions of 3 & 4 Vict. c. 113, incorporated in this act.

S. 15. Act may be amended or repealed this session.

CAP. 27.—An Act for better enabling Incumbents of Ecclesiastical Benefices to demise the Lands belonging to their Benefices on Farming Leases.

[18th June, 1842.]

CAP. 28.—An Act to assimilate the Law in Ireland, as to the Punishment of Death, to the law in England, to abolish the Punishment of Death in certain cases in Ireland, and to substitute other Punishments in lieu thereof. [18th June, 1842]

CAP. 29.—An Act for establishing a Prison at Pentonville. [18th June, 1842.]

S. 1. The Pentonville prison shall be used as a prison for the offenders herein-after specified, and shall be within the provisions of the 5 & 6 W. 4, c. 38, and 2 & 3 Vict. c. 56.

S. 2 exempts the prison from rates and taxes.

S. 3. Provisions for confirmation of the title of the crown to lands purchased before this act for the purposes thereof.

S. 4. Provision for ascertaining the value to be paid for such lands, by the jury who shall try any proceeding brought for the recovery of them.

S. 5. The Crown, by advice of the Privy Council, to appoint commissioners for governing the prison, not being less than seven, nor more than eleven.

S. 6 provides for appointment of officers by secretary of state.

S. 7. Secretary of state may require security from officers.

S. 8. Provisions for ousting dismissed officers.

S. 9. Commissioners to have the same powers as visiting justices of prisons, and empowered to make rules for their meeting, and for the government of the prison, subject to the approval of the secretary of state.

S. 10. Commissioners to appoint visitors from among themselves.

S. 11. Commissioners to be a body corporate.

S. 12. Commissioners empowered to contract for clothing, diet &c., for the convicts.

S. 13. Commissioners to report annually to the secretary of state ; such reports to be laid before both houses of parliament.

S. 14 empowers the secretary of state to direct the removal to the Pentonville prison of male convicts under sentence of transportation.

S. 15 provides for the reception of such convicts, after medical examination.

S. 16. Convicts to continue there till transported according to law, pardoned, entitled to their freedom, or removed by order of the secretary of state to other prisons ; and to be subject to the stat. 5 G. 4, c. 84.

S. 17. Convicts not to be compulsorily discharged if labouring under any acute or dangerous distemper, and on discharge to receive decent clothing, and such assistance in money as shall be judged proper by the commissioners.

S. 18. Provisions as to hours of work.

S. 19. None but commissioners or other officers to enter any part of the prison allotted to the prisoners, or to hold communication with them.

S. 20. The governor to have the same powers over the convicts as the sheriff or gaoler, and in case of misbehaviour to be liable to the same punishment as a gaoler.

S. 21. Convicts assaulting any of the officers to be subject on conviction to two years additional imprisonment, and to corporal punishment.

S. 22. Secretary of state may order the removal of any convict from the prison as incorrigible; to be liable in such case to his full sentence of transportation.

S. 23. Commissioners to report insane convicts for removal, by order of the secretary of state.

S. 24. Convicts breaking prison or escaping, punishable by three years' additional imprisonment, and the second offence to be felony; attempts at breach of prison or escape, punishable by twelve months' additional imprisonment.

S. 25. Rescue of prisoners, voluntary escape by officers, and aiding of escapes by other persons, and attempts to rescue, declared to be felony; and negligent escapes declared to be a misdemeanor.

S. 26. Penalty on officers, &c. furnishing convicts with prohibited articles; £50, or imprisonment not exceeding six months.

S. 27. False evidence before the commissioners to be punishable as perjury.

S. 28. Mode of trial and conviction.

S. 29. Expenses of executing this act to be laid before parliament.

S. 30. Provisions in favour of justices of the peace, to extend to the commissioners.

S. 31. Limitation of actions to the place where the fact was committed, and to a period of six calendar months.

S. 32. Act may be amended or repealed this session.

CAP. 30.—An Act to provide Regulations for preparing and using Roasted Malt in colouring Beer. [18th June, 1842.]

CAP. 31.—An Act to indemnify Witnesses who may give evidence before the Committee appointed by the House of Commons to inquire " whether corrupt Compromises had been entered into in the Cases of Election Petitions presented from Harwich, Nottingham, Lewis, Penryn and Falmouth, Bridport and Reading, for the purpose of avoiding Investigation into gross Bribery alleged to have been practised at the Elections for the aforesaid towns, and whether such Bribery has really taken place. [18th June, 1842.]

CAP. 32.—An Act for better recording Fines and Recoveries in Wales and Cheshire. [18th June, 1842.]

S. 1. All fines levied in the late courts of great sessions in Wales, and the

court of session in Cheeshire, shall be held to be good in law, notwithstanding any misprision or neglect of the officers in keeping the record.

S. 2. Fines to be taken to have been levied with proclamations, though no chirograph be endorsed or entered of record, if the fine were duly enrolled or docketed, so as to set forth the names of parties and the places; or if within three years they shall be docketed as hereinafter mentioned, or the proceedings enrolled, provided that such fine may be reversed by writ of error within twenty years from the levying of it.

S. 3. Recoveries, whereof the writ of entry was returned, and the appearances duly recorded, or the warrants of attorney duly executed and allowed, and of which the proceedings were lodged in the proper office, to be held good in law, notwithstanding the non-enrolment or non-exemplification of the recovery, or any other misprision or neglect of the officer, if the proceedings be enrolled, or the recovery docketed within three years, in manner hereinafter mentioned: provided that any such recovery may be reversed by writ of error within twenty years of the recovery of it.

S. 4. Provisions for enrolment of the fines and recoveries in the office of registrar of the Court of Common Pleas, which is to be deemed to be the enrolment office named in the 27 Eliz. c. 9.

S. 5. Court of Common Pleas to have the same powers of amendment as in the case of fines and recoveries levied or suffered in that court.

S. 6. Act may be amended or repealed this session.

CAP. 33.—An Act to amend and explain so much of Two Acts of the Sixth and Seventh years of His late Majesty, and the first year of Her present Majesty, as relates to the execution of Civil Bill Decrees for the possession of Land in Ireland. [18th June, 1842.]

CAP. 34.—An Act for granting to Her Majesty, until the Fifth day of July, One Thousand Eight Hundred and Forty-three, certain Duties on Sugar imported into the United Kingdom, for the service of the year One Thousand Eight Hundred and Forty-two. [18th June, 1842.]

CAP. 35.—An Act for granting to Her Majesty certain Duties on Profits arising from Property, Professions, Trades and Offices, until the Sixth day of April, One Thousand Eight Hundred and Forty-five. [22d June, 1842.]

CAP. 36.—An Act for regulating the sale of Waste Land belonging to the Crown in the Australian Colonies. [22d June, 1842.]

CAP. 37.—An Act to continue until the Fifth Day of April, One Thousand Eight Hundred and Forty-four, Composition for Assessed Taxes, and to amend the Laws relating to the Land and Assessed Taxes. [30th June, 1842.]

CAP. 38.—An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace. [30th June, 1842.]

S. 1. Justices in sessions, and recorders, restrained from trying any person for any treason or felony, punishable on the first occasion by transportation for life, or for any of the following offences:—1. Misprision of treason; 2. Offences against the crown or parliament; 3. Offences subject to the penalties of præmunire; 4. Blasphemy, &c.; 5. Unlawful oaths; 6, 7, Perjury and subornation of perjury; 8. Forgery; 9. Firing crops, plantations, &c.; 10. Bigamy; 11. Abduction; 12. Concealment of birth; 13. Offences against the bankrupt or insolvent law; 14. Libel; 15. Bribery; 16. Unlawful combinations or conspiracies, except to commit offences triable in sessions; 17. Stealing or destroying records; &c.; 18. Stealing, destroying or concealing wills or title-deeds; proviso for

saving the jurisdiction of the Central Criminal Court as to offences mentioned in the 4 & 5 Will. 4, c. 36.

S. 2. Provisions for removal of indictments found at sessions for the above offences to the assizes, and for removal of prisoners by habeas corpus to the county gaol for trial at the assizes.

S. 3. Recognizances to the sessions to be obligatory to appear at the assizes.

S. 4. Power to divide courts of sessions of the peace.

S. 5. Act may be amended or repealed this session.

S. 6. Act not to extend to Scotland or Ireland.

CAP. 39.—An Act to amend the Law relating to Advances *bonâ fide* made to Agents intrusted with Goods. [30th June, 1842.]

S. 1 recites the 6 Geo. 4, c. 94, s. 1, and enacts, that any agent hereafter intrusted with the possession of goods, or of the documents of title to goods, shall be deemed to be the owner of such goods or documents, so as to give validity to any agreement by way of pledge, lien, or security *bonâ fide* made by any person with him, as well for any original loan or payment, as for any further advance; and such agreement to be binding against the owner of the goods, though the pledgee had notice that the party was only an agent.

S. 2. Pledges in consideration of the delivery to such agent of goods, documents, or securities on which the party had a valid lien by virtue of a previous contract, if *bonâ fide*, to be subject to the same protection; but no lien to be acquired thereby beyond the value of the goods given up.

S. 3. But the statute to be construed to protect only transactions made, *bonâ fide*, without notice that the agent pledging is acting without authority, or *malâ fide* against the owner.

S. 4. Meaning of the term "documents of title;" agents possessed of such documents, whether derived immediately from the owner of the goods, or obtained by reason of their having been intrusted with the goods or of any other document of title, to be deemed to have been intrusted with the possession of the goods represented by such documents, and pledges thereof to be deemed pledges of the goods; and such agents to be deemed to be in possession of the goods or documents, whether in his actual custody or held by another on his behalf: loans to be valid if *bonâ fide* made on the faith of a contract in writing to transfer such goods or documents, though they be not actually transferred till afterwards; contracts made with any person on behalf of such agent to be deemed a contract with him; any payment by money or securities to be deemed an advance within the act; and agents in possession of goods and documents to be deemed *primâ facie* to have been intrusted with them by the owner.

S. 5. Nothing herein contained to affect the civil responsibility of an agent to his principal.

S. 6. Agent making consignments, &c. or accepting advances, contrary to or without the authority of his principal, and persons knowingly aiding therein, to be guilty of a misdemeanour, punishable with transportation for fourteen years or fine and imprisonment; but this provision not to apply to contracts where the goods &c. are made a security for an amount not greater than that due to the agent from his principal; conviction not to be received in evidence against the party in any civil suit; and agent not to be liable to conviction if he have previously disclosed the act on oath under compulsory process of law, or before commissioners of bankrupt.

S. 7. Saves the right of the owner to redeem the goods or documents, or recover the balance of the proceeds, on repayment of the amount of the lien, or restoration

of the securities, and on payment of the lien of the agent ; in case of bankruptcy of the agent, the owner to prove for the amount paid to redeem, or for the value of the goods if unredeemed.

S. 8. Interpretation clause.

S. 9. Act not to affect contracts already made.

CAP. 40.—An Act for carrying into effect the Treaty between Her Majesty and the Argentine Confederation for the Abolition of the Slave Trade. [30th June, 1842.]

CAP. 41.—An Act for carrying into effect a Convention between Her Majesty and the Republic of Hayti for the more effectual Suppression of the Slave Trade.

[30th June, 1842.]

CAP. 42. An Act for better and more effectually carrying into effect Treaties and Conventions with Foreign States for Suppressing the Slave Trade.

[30th June, 1842.]

CAP. 43.—An Act to confirm certain Proceedings which may have been had after the passing of the Act intituled "An Act to define the Jurisdiction of Justices in general and Quarter Sessions of the Peace."

[1st July, 1842.]

Trials which may have been had at sessions since the passing of the 5 & 6 Vict. c. 38 (ante, p. 262), or which may be had before 15th July instant, for any of the offences therein mentioned, to be as valid as if the recited act had not passed.

CAP. 44.—An Act for the Transfer of Licences and Regulation of Public Houses.

[1st July, 1842.]

S. 1 authorizes transfer of licences by justices at petty sessions held under 9 Geo. 4, c. 61, except in the metropolitan police district.

S. 2. Where licences are lost, a copy may be indorsed by the justices, and considered valid.

S. 3. Fee on such indorsement.

S. 4. Disqualified justices not to act at such petty sessions.

S. 5. No exciseable liquors to be sold on board any boats or vessels moored or lying at anchor during the time when prohibited to be sold at public houses.

S. 6. Act not to extend to the universities of Oxford and Cambridge.

CAP. 45.—An Act to amend the Law of Copyright. [1st July, 1842.]

S. 1 repeals the 8 Anne, c. 19 ; 41 Geo. 3, c. 107 ; and 54 Geo. 3, c. 156, except as to pending proceedings.

S. 2. Interpretation clause.

S. 3. Copyright in books hereafter published in the author's lifetime to endure for his life and seven years longer, and to be the property of the author and his assigns ; or for forty-two years : and copyright in books published after the author's death to endure for forty-two years, and to be the property of the proprietor of the MS. or his assigns.

S. 4. In cases of subsisting copyright the term to be extended as above, except when it shall belong to an assignee for other consideration than natural love and affection ; in which case it shall cease at the expiration of the present term, unless its exclusion be agreed to between the proprietor and the author.

S. 5. The judicial committee of the privy council may license the republication of books which the proprietor refuses, after the death of the author, to republish.

S. 6. Copies of books published after the passing of this act, and of all subsequent editions, to be delivered within certain times at the British Museum.

S. 7. Time and mode of delivery.

Ss. 8, 9, and 10 provide for delivery of copies to other public libraries.

S. 11 provides for keeping of a book of registry of proprietorship in copyrights, at Stationers' Hall.

S. 12. Making false entry in the book of registry to be a misdemeanor.

S. 13 provides for the mode of making entries of copyright in the book of registry.

S. 14. Persons aggrieved by any such entry may apply to the Court or a judge for an order to have it varied or expunged.

S. 15. Remedy for piracy of books by action on the case.

S. 16. Defendants in such actions to give notice of the objections to the plaintiff's title on which they mean to rely.

S. 17. No person, except the proprietor of the copyright or his authorized agent, shall import into the British dominions, for sale or hire, any book first composed or published within the United Kingdom, or reprinted elsewhere, under penalty of forfeiture thereof, and also of 10*l.* and double the value; and forfeited books may be seized by officers of customs or excise.

S. 18. Provisions as to copyright in encyclopædias, periodicals, and works published in a series, reviews, or magazines: proviso for authors who have reserved to themselves the right of publishing their articles in a separate form.

S. 19. Proprietors of such publications may enter at once at Stationers' Hall, and thereon have the benefit of the registration of the whole.

S. 20. Provisions of 3 & 4 Will. 4, c. 15, extended to musical compositions and the term of copyright, as provided by this act, applied to the liberty of representing dramatic pieces and musical compositions.

S. 21. Proprietors of the right of dramatic representations shall have all the remedies given by the 3 & 4 Will. 4, c. 15.

S. 22. Assignment of copyright of a dramatic piece not to convey the right of representation, unless an entry be made in the book of registry expressing such to be the intention of the parties.

S. 23. Printed books shall become the property of the proprietor of the copyright, and may be recovered in trover.

S. 24. No proprietor of copyright commencing after the passing of this act shall maintain any action for any infringement, before making an entry in the book of registry: but nothing herein to prejudice the remedies of the proprietor of the right of representation of a dramatic piece, under 3 & 4 Will. 4, c. 15, though no such entry be made.

S. 25. Copyright to be personal property, and transmissible as such.

S. 26. Limitation of actions, pleading, costs, &c.

S. 27 saves the rights of the universities of Oxford and Cambridge, the Scotch universities, Dublin university, and the colleges of Eton, Westminster, and Winchester.

S. 28. Saving of all subsisting rights, contracts, and engagements.

S. 29. Act to extend to the United Kingdom, and to every part of the British dominions.

S. 30. Act may be amended or repealed this session.

CAP. 46.—An Act to amend an Act of the Third and Fourth Years of her present Majesty, for the Regulation of Municipal Corporations in Ireland.

[1st July, 1842.]

EVENTS OF THE QUARTER.

So much of the session about to terminate has been wasted in party politics and useless discussions regarding notorious abuses of the elective franchise, that the most important of the promised or threatened measures of law reform have been postponed. The revising barristers remain untouched, and the local court schemes will probably stand over. Amongst these the Lord Chancellor's, as we anticipated, is best adapted to the exigencies of the case. It supplies a cheap and accessible jurisdiction for debts of small amount without seriously infringing on the principle of centralisation, which forms the distinctive merit of the English system of jurisprudence.

The Lord Chancellor has also introduced useful measures for amending the administration of the law of bankruptcy and lunacy, and adopted the wisest method of reforming the abuses of the equity courts. Being necessarily unable to devote the required attention to the subject, he has requested a limited number of eminent practitioners to investigate it and draw up a set of suggestions. These, it is expected, will soon be laid before the public, and we shall then take the earliest opportunity of considering them. It is said that the whole system of costs will be remodelled. A bill has just been brought in abolishing the offices of Clerks of Enrolments, Comptrollers of the Hanaper, Six Clerks, Sworn Clerks, and Waiting Clerks, and transferring the business to a new set of offices. The duties of the Six Clerks are to be discharged by "Clerks of Records and Writs," each of whom is to receive 1200*l.* a year; and "Taxing Masters" are to be appointed at salaries of 2000*l.* a year each.

We cannot help wishing that an inquiry of the same sort were instituted into the mode of transacting business in the common law courts, for there is a prevalent and we fear well-founded conviction that there is great room for improvement in this respect. The Queen's Bench has too much business, the Common Pleas (and perhaps the Exchequer) too little, yet though the complaint is daily growing louder and louder, no prospect of a remedy is held out.

Not content with the prevalent prejudices, some members of the profession seem to take a pleasure in exciting a feeling against the body whenever a plausible opportunity presents itself. A little time ago, the leaders of the bar were attacked for accepting more briefs than they could attend to, and now the solicitors are accused of not paying barristers their fees. We really do not see why the public are to be appealed to, or new regulations called for, in either instance. It is vain to tell a client that the Attorney or Solicitor General is too much occupied to give individual attention to his case; he will insist on one or both of them being retained, and take his chance of being present. It is equally vain to provide that the payment of the fee shall be invariably a condition precedent to the acceptance of a brief. The solicitor or clerk has no cash about him, the brief is left when the barrister is out, or an account is kept for mutual convenience. So long as a good understanding prevails between the respective classes of the profession, such arrangements will inevitably take place, and the resulting inconvenience is hardly great enough to justify an alteration in the law. It has been proposed to give barristers an action for their fees, and make them liable for negligence. Special pleaders may maintain actions, yet no class suffer more from bad debts; and as to liability for negligence, it would easily be evaded by giving notice that the client must take his chance. A little common-sense reflection on the tendency of every species of rule or regulation to abuse, would save an infinity of trouble to readers, and diminish by more than three-fourths the correspondents, of newspapers.

LIST OF NEW PUBLICATIONS.

Ordines Cancellariæ, being a Selection of General Orders of the High Court of Chancery from the year 1814 to the present time. By Charles Beavan, Esq. Barrister at Law. In 12mo. Price 5s. 6d., boards.

Burn's Ecclesiastical Law. The Ninth Edition, corrected, with very considerable Additions, including the Statutes and Cases to the present time. By R. Philimore, Advocate in Doctors' Commons, Barrister of the Middle Temple, and Official of the Archdeaconries of London and Middlesex. In 4 Vols. 8vo. Price 3l. 16s. boards.

Chitty's General Practice of the Law in all its Departments. The Third Edition of Vols. 3 & 4, containing the Practice of the Superior Courts, &c. corrected and brought down to the present time. By Robert Lush, Esq. Barrister at Law. In One Vol. royal 8vo. Price 2l. 10s. boards.

A Treatise on the Law of Sheriff, with Practical Forms and Precedents. By Richard Clarke Sewell, Esq. D.C.L. Barrister at Law. In 8vo. Price 21s. boards.

The Municipal Corporation Act 5 & 6 Will. 4, c. 76, and the Acts since passed for amending the same; with Notes and References to the Cases thereon, also an Appendix containing the principal Statutes referred to, including those relating to Mandamus and Quo Warranto; a List of Boroughs having Quarter Sessions, Borough Court Rules, &c., &c. By Christopher Rawlinson, Esq. Barrister at Law, and Recorder of Portsmouth. In 12mo. Price 15s. boards.

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Principles of the Laws of England in the Various Departments; and also the Practice of the Superior Courts, in the Form of Question and Answer, for the Assistance of Articled Clerks in preparing for Examination and incidentally for the Use of Practitioners. By Richard Sargent, Solicitor, Second Edition, revised and much enlarged. Part I. Common Law—Conveyancing. In 8vo. Price 15s. boards.

The Income Tax Act, 5 & 6 Vict. c. 35; with a Practical and Explanatory Introduction and Index. By John Paget, Esq. of the Middle Temple, Barrister at Law. Second Edition. In 8vo. Price 4s. boards.

Practice of the Court of Chancery; with an Appendix, containing all the General Orders issued on or since the 3rd April, 1828, and also the recent Statutes relative to Practice. By S. Atkinson, Esq. of Lincoln's Inn, Barrister at Law. In 12mo. Price 12s. boards.

Inquiries in International Law. By James Reddie, Esq. Advocate, Author of "An Historical View of the Law of Maritime Commerce." In 8vo. Price 7s. boards.

A Practical Treatise on the Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice on Parliamentary Divorce. By John Macqueen, Esq. of Lincoln's Inn, Barrister at Law. In royal 8vo. Price 1*l.* 1*s.* 6*d.* boards.

A Supplement to an Inquiry into the Principles of Pleading the General Issue, since the Promulgation of the New Rules; containing the Reported Cases on the Effect of the General Issue, from Trinity Term, 1838, to Trinity Term, 1842, inclusive, with Notes. By Alfred J. P. Lutwyche, of the Middle Temple, Esq. Barrister at Law. Price 1*s.* 6*d.* in wrapper.

THE LAW MAGAZINE.

ART. I.—AMERICAN CRIMINAL TRIALS.

American Criminal Trials. By Peleg W. Chandler. Vol. I.
Boston and London. 1841.

THE announcement of a series of American *Causes Célèbres* excited our interest and raised our expectations in no ordinary degree. The annals of the United States are rich in juridical anomalies, and (with rare exceptions) the most distinguished of their public men have earned their earliest and sometimes highest honours at the bar. In a list of American orators, recently published in the *Quarterly Review*, Mr. Everett was the only one who was not a lawyer: amongst the extracts given as the specimens of their respective styles of speaking, a large proportion were taken from their forensic efforts; and the inference was unavoidable, that abundant materials existed for a collection of trials which should need neither preface nor apology. Mr. Chandler, however, thinks proper to make both:

“The publication of the following volume may be regarded as an experiment, which, if successful, will demonstrate that the most important and interesting criminal trials, which have taken place in this country, may be rendered acceptable to the general reader, in the form of abridged narrations divested of the technicalities of legal proceedings.

“In selecting the cases for publication, the author has been chiefly governed by a desire to present those, which might be interesting to the American reader, not only as illustrative of the morals and manners, but as connected with the religious or political history, of the periods in which they occurred; and, in preparing them for the press, he has attempted to give an account of each case, after a careful examination of all the facts which might throw light upon it, in the form of a narrative accompanied by such general remarks and reflections as naturally suggested themselves to his mind; no other idea of completeness or unity of purpose being entertained, so far as

the present work is concerned, than that every trial should contain all the facts, necessary to make it intelligible by itself and without reference to any other."

He then proceeds to explain why judicial investigations are ordinarily deemed interesting, and states in what particulars the plan of his work differs from that of the State Trials or the Causes Célèbres. Mr. Ainsworth will probably dissent from the opinion intimated in the next paragraph :

" Another work, of a character and tendency somewhat different from those just mentioned, which is much better known to English and American readers, in general, and has exercised a more decided influence upon society, will be readily recognized as the *Newgate Calendar*. The plan and object of this collection, which has served as a model for a species of literature now unfortunately become popular in this country, are too well known to require any explanation, in this place ; or to make it necessary to record here the condemnation pronounced against it by the tribunals of morals and taste. Works of this description, which, by their false and glowing pictures of criminal trials, create an admiration for desperate and wicked men, and excite a sympathy for their fate, in minds of kindred depravity, cannot be too strongly deprecated as injurious to the best interests of society."

The author is certainly mistaken as to the degree of influence which he attributes to the *Newgate Calendar* in this country ; but he has probably formed an accurate estimate of its circulation and popularity in his own.

" The plan of the present work more nearly resembles that of the French collection than of any one in our own language. The design is to give a historical sketch of each case, upon a careful examination and consideration of all the facts connected with it, in the form of an abridged narrative. But it is obvious, that no general plan of a work like this can be so comprehensive, as not to require to be variously modified in respect to each particular trial. It is true of some criminal trials, that they explain themselves, and then it is only necessary to give a report of the actual proceedings, with an attempt, perhaps, to adjust the incidents so as to produce the most harmonious or striking effect. In some instances, the trial is the least part of the history of a case, and may be merely mentioned as a collateral fact. In others, the entire interest of the case depends upon the actual proceedings at the trial, and here care must be taken to give the full dramatic effect, by suffering the actors in the exciting

scene to speak for themselves. In other cases, the arguments of the advocates at the bar are the chief points of interest, entirely overshadowing every thing else connected with the trial; and in these it is necessary to present the facts and circumstances which go to illustrate the arguments. It is manifest, therefore, that every criminal trial must have a plan of its own, in order to keep up the interest of the reader, and to preserve the dramatic effect of the scenes and events which it discloses.

"It will thus be seen, that the plan of this work is somewhat ambitious; and the execution of it will be vastly more laborious than that of a mere collection of trials, without any attempt to render them more complete, by collating the different reports of each trial, and illustrating it by facts and circumstances drawn from other sources. This labour will be much increased in cases where no regular report has ever been made, which unfortunately is true of many American trials of great interest. The author is sensibly impressed with the difficulties of the task which he has undertaken, but he has entered upon it the more willingly, as, from the nature of the work, it may at any time be relinquished, if his labours become unsatisfactory to the public, or oppressive to himself. Without the expectation of giving his production the character of completeness which belongs to the State Trials, or the hope of infusing into it the spirit and interest which characterize the *Causes Célèbres*, he may yet be permitted to remark, that, if his 'trials' should not be found in strict accordance with truth, it will not be for the want of industrious research on his part; and if they do not prove to be interesting, it will not be for the want of rich materials to render them so."

We have allowed the author to speak for himself about his plan; and we shall endeavour to enable our readers to judge for themselves of its execution by extracting largely from the most remarkable cases.

The trial of Anne Hutchinson in 1636 stands first, and affords a striking proof of the readiness of the early settlers who had left England for conscience sake to become persecutors in their turn.

It had long been the custom in Boston for the members of the several congregations to hold private meetings for religious exercises, from which women were excluded. Mrs. Hutchinson, "a woman of a haughty and fierce carriage, of a nimble wit and active spirit, and a very voluble tongue," impatient at this exclusion, established a meeting for women, at which she

held forth with great freedom and effect. At first the clergy approved, and the governor (Henry Vane) warmly applauded the innovation, but the authorities, lay and clerical, soon found reason to regard it with distrust; for, independently of the heretical or schismatic character of many of her doctrines, her influence was of a sort which might be turned at any moment against the established teachers or rulers, and the impatience of control manifested by her female followers, already threatened the quiet of the colony. It was quite right therefore to check her, provided this could be done in such a manner as neither to inflict the sufferings or confer the honours of martyrdom. But justice and temper in dealing with religious matters were not to be expected from the age. Mrs. Hutchinson was persecuted in the worst sense of the word, and the suppression of her influence occasioned more disturbance and did more mischief than any exertion of it could have done.

The attack was commenced by the synod of Newtown, the first synod ever assembled in America, which formally enumerated and condemned eighty-two errors attributed to Mrs. Hutchinson. She and her party retorted by branding their opponents with every designation of contempt. Vane, the governor, stood by her so long as he remained in office, but the general elections coming on in the midst of the excitement, he was worsted in the struggle, and Winthrop, her fell opponent, became governor in his place. The secular arm was thus placed at the disposal of the clergy, and they lost no time in making the best of their advantages. The general court, at their suggestion, began by banishing her brother-in-law for refusing to acknowledge his guilt, and then summoned her to take her trial before them assisted by several elders of the church. No set form of inquiry was observed, and she appears to have been subjected to a sort of inquisitorial process, in the course of which all the most zealous of her opponents were admitted to break a lance with her:

“ ‘ You are called here,’ said governor Winthrop, at the commencement of these extraordinary proceedings, ‘ as one of those that have troubled the peace of the commonwealth and the churches here; you are known to be a woman that hath had a great share in the promoting and divulging of those opinions that are causes of this trouble, and to be nearly joined, not only in affinity and affection,

with some of those the court hath taken notice of, and passed censure upon, but you have spoken divers things, as we have been informed, very prejudicial to the honour of the churches and ministers thereof, and you have maintained a meeting and an assembly in your house that hath been condemned by the general assembly as a thing not tolerable nor comely in the sight of God, nor fitting for your sex, and notwithstanding that was cried down, you have continued the same; therefore we have thought good to send for you to understand how things are, that if you be in an erroneous way, we may reduce you, that so you may become a profitable member here among us: otherwise if you be obstinate in your course, that then the court may take such course that you may trouble us no farther. Therefore I would entreat you to express, whether you do not hold and assent in practice, to the opinions and factions that have been handled in court already, that is to say, whether you do not justify Mr. Wheelwright's sermon and the petition.'"

This mode of calling on accused persons to say whether they do or do not agree in the doctrines contained in the sermons, books, or other publications of others, will be remembered as that pursued with the Jansenists, which have always been regarded as the *ne plus ultra* of injustice and absurdity.

" 'I am called here,' was the appropriate and striking answer of Mrs. Hutchinson, embodying a great principle of the common law, which requires every offence to be set forth with clearness and certainty, 'to answer before you, but I hear no things laid to my charge.'

" 'I have told you some already, and more I can tell you.'

" 'Name one, sir.'

" 'Have I not named some already?'

" 'What have I said or done?'

" 'Why, for your doings, this, you did harbour and countenance those that are parties in this faction, that you have heard of.'

" 'That's matter of conscience, sir.'

" 'Your conscience you must keep, or it must be kept for you.'

" 'Must I not, then, entertain the saints, because I must keep my conscience?'

" 'Say, that one brother should commit felony or treason, and come to his other brother's house, if he knows him guilty, and conceals him, he is guilty of the same. It is his conscience to entertain him, but if his conscience comes into act in giving countenance and entertainment to him that hath broken the law, he is guilty too. So if you do countenance those that are transgressors of the law, you are in the same fact.'

" 'What law do they transgress?'

" 'The law of God and of the state.'

" 'In what particular ?'

" 'Why in this among the rest, whereas the Lord doth say honour thy father and thy mother, which includes all in authority ; but these seditious practices of theirs have cast reproach and dishonour on the fathers of the commonwealth.'

" 'Do I entertain, or maintain them in their actions, wherein they stand against any thing that God hath appointed ?'

" 'Yes, you have justified Mr. Wheelwright's sermon, for which you know he was convict of sedition, and you have likewise countenanced and encouraged those that had their hands to the petition.'

" 'I deny it ; I am to obey you only in the Lord.'

" 'You have joined them in the faction.'

" 'In what faction have I joined with them ?'

" 'In presenting the petition.'

" 'But I had not my hand to the petition.'

" 'You have counselled them.'

" 'Wherein ?'

" 'Why, in entertaining them.'

" 'What breach of law is that, sir ?'

" 'Why, dishonouring of parents.'

" 'But put the case, sir, that I do fear the Lord and my parents, may not I entertain them that fear the Lord, because my parents will not give me leave ?'

" 'If they be the fathers of the commonwealth, and they of another religion, if you entertain them, then you dishonour your parents and are justly punishable.'

" 'If I entertain them as they have dishonoured their parents, I do.'

" 'No, but you by countenancing them above others put honour upon them.'

" 'I may put honour upon them as the children of God, and as they do honour the Lord.'

" 'We do not mean to discourse with those of your sex upon this,' the governor replied, apparently tired of this part of the subject, 'you do adhere unto them and do endeavour to set forward this faction, and so you do dishonour us.'"

She does not appear to have been quite so happy in the defence of her weekly meetings :

" 'Will it please you to answer this, and to give me a rule, for then I will willingly submit to any truth. If any come to my house to be instructed in the ways of God, what rule have I to put them away ?'

" 'Suppose,' was the answer, 'that a hundred men come unto you to be instructed, will you forbear to instruct them?'

"In answer to this, Mrs. Hutchinson said, that such a course must, in her opinion, be unauthorized by scripture; but if one man should come to her and ask her instruction upon religious matters, she conceived that she might give it to him.

" 'Here is my authority, Aquila and Priscilla took upon them to instruct Apollo more perfectly, yet he was a man of good parts, but they being better instructed, might teach him.'

" 'See how your argument stands,' answered the governor, 'Priscilla with her husband took Apollo home to instruct him privately, therefore Mistress Hutchinson, without her husband, might teach sixty or eighty!'

A good deal turned on the expressions used by her at a conference with the clergy, several of whom came forward to depose to them, but objected to being sworn. Three at length consented and confirmed the testimony of the rest. A gentleman present at the conversation ventured to state that he did not understand her to say all that was alleged against her:

" 'How dare you look into the court to say such a word?' said Hugh Peters.

" 'Mr. Peters takes it upon him to forbid me, and I shall be silent,' was the reply; and he did not speak again."

This was the famous Hugh Peters, who, though guilty of the crime charged against him, was exposed throughout his own trial to the same sort of injustice.

Fortunately for the credit of the court, Mrs. Hutchinson saved them the trouble of adducing further evidence by the open avowal of the worst of her alleged heresies. She thus justified her claim to a particular and private revelation:

" *Nowell.* How do you know that that was the Spirit?

" *Mrs. H.* How did Abraham know that it was God that bade him offer his son, being a breach of the sixth commandment?

" *Deputy Governor Dudley.* By an immediate voice.

" *Mrs. H.* So to me by an immediate revelation.

" *Dudley.* How! an immediate revelation?

" *Mrs. H.* By the voice of his own Spirit to my soul. I will give you another scripture, Jer. xlv. 27, 28—out of which the Lord showed me what he would do for me and the rest of his servants. But after he was pleased to reveal himself to me, I did presently like Abraham run to Hagar. And, after that, he did let me see the

atheism of my own heart, for which I begged of the Lord that it might not remain in my heart; and, being thus, he did show me this (a twelvemonth after) which I told you of before. Ever since that time I have been confident of what he revealed unto me."

It is remarkable that the governor, in the very act of condemning her, supposes a direct and particular interposition. The sentence was rigidly enforced. She was obliged to quit the colony, and eventually took refuge in East Chester, within the territory of the Dutch, where, in 1643, she and her family were destroyed by the savages.

A note informs us that the general court before which her trial took place resembled the Star Chamber in the arbitrary character of its proceedings. "They have put to death, banished, fined men, cut off men's ears, whipped, imprisoned men, and all these for ecclesiastical and civil offences, and without sufficient record." Yet this assembly was essentially popular in its constitution, and might be supposed to represent the liberal opinions of the day.

"The Trials of the Quakers" illustrate the same sad truth: that religious toleration, though one of the most obvious, is one of the last duties learnt from Christianity. Sir Thomas More, reckoned one of the most amiable and mild-hearted of human beings, lends his personal aid to increase the tortures of a woman on the rack; and more than a century later, the inhabitants of a large Christian colony recklessly inflict severe banishments of all kinds, including death, on numbers of their fellow countrymen, male and female, for absurdities which at worst merited the confinement of the stocks.

Quakers first became known as a distinct class in the north of England about 1644. They were exposed to every description of indignity in the old world, and their condition was rather aggravated than bettered by removal to the new.

"When in July, 1656, Anne Austin and Mary Fisher arrived in the road against Boston, in a vessel from Barbadoes, their trunks were searched and their books burnt by the hangman. Other indignities they suffered, for which there was no authority by law; and, after five weeks of close imprisonment, they were thrust out of the jurisdiction, the jailer retaining their beds for his fees.

"The ambition of Mary Fisher became enlarged by this

treatment, and she travelled alone to Adrianople, where, coming near the grand vizier's camp, she sent him word that there was an English lady, who had something to declare from the Great God to the great Turk. She was admitted to the sultan Mahomet IV., delivered her message, which was received with gravity, and suffered to depart 'without hurt or scoff.' Bishope remarks, with complacent sarcasm, that she fared better among heathens than among Christians. He probably was not aware, that the Turks regard insane persons as inspired. Kelsey, another Quaker, experienced less courtesy. He preached in the streets of Constantinople, and, by advice of the English ambassador, was bastinadoed."

At this time there was no law against Quakers, a defect very speedily supplied. A law was made by the general court, reciting that "whereas there is an accursed sect of heretics lately risen up in the world, which are commonly called Quakers, who take upon them to be immediately sent of God, and infallibly assisted by the Spirit, to speak and write blasphemous opinions, despising government, and the order of God in church and commonwealth, speaking evil of dignities, reproaching and reviling magistrates and ministers; and provided that any master of a ship bringing any known Quaker within the jurisdiction, should forfeit one hundred pounds, and should give security to carry such Quakers back to the place whence he brought them; and on the arrival of such Quakers, they were to be severely whipped, and confined at hard labour in the house of correction. By a subsequent law, persons who should entertain Quakers were liable to a fine of forty shillings for every hour's entertainment. Any person defending their 'pernicious ways,' or attending their meetings, was also liable to a fine. Every Quaker, after the first conviction, if a man, was to lose one ear, and the second time, the other; if a woman, she was each time to be severely whipped; and for the third offence, both men and women were to have their tongues bored through with a red hot iron."

In part justification of this severe law, it should be mentioned, that some of the sect were guilty of the most culpable extravagances. They termed the sacraments carnal and idolatrous observances: they stigmatized a regular priesthood as

a priesthood of Baal, and often interrupted public worship by their outpourings when moved by what they termed the spirit. In 1665, a respectable married woman, named Lydia Wardell, entered stark naked into a church at Newbury, alleging that the inward light had enjoined her to illustrate the spiritual nakedness of her neighbours in this fashion. In 1675, Margaret Brewster, arriving in Boston on a Sunday, with four companions, rushed into a church clothed in sackcloth, with ashes on her head, her hair streaming from her shoulders, her feet bare, and her face begrimed with coal dust. She announced herself as an illustration of the small pox, which she predicted as an approaching judgment upon the people.

On the other hand, it was alleged in their defence, that they were not guilty of these outrages until they had been worked into madness by their sufferings. The ferocity with which the new law was enforced affords ample ground for this apology. The persons named in the following sentence had been banished for their opinions, but returned, two of them alleging that they were ordered by the Lord to lay down their lives for their principles :

“ ‘ Whereas William Robinson, Marmaduke Stephenson, and Mary Dyer, are sentenced by this court to death for their rebellion, &c. ; it is ordered, that the secretary issue out his warrant to Edward Mitchelson, marshal general, for repairing to the prison on the twenty-seventh of this instant October, and take the said William Hutchinson, Marmaduke Stephenson, and Mary Dyer, into his custody ; and then, forthwith, by the aid of Captain James Oliver, with one hundred soldiers taken out by his order proportionately out of each company in Boston, completely armed with pike, and musketeers with powder and bullet, to lead them to the place of execution, and there see them hang till they be dead. And in their going, and being there and return, to see all things be carried peaceably and orderly. Warrants issued accordingly. It is ordered that Mr. Zachariah Symmes and Mr. John Norton repair to the prison and render their endeavours to make the prisoners sensible of their approaching danger by the sentence of this court, and prepare them for their approaching end.’ ”

“ On the afternoon of October 22d, the prisoners were led forth to execution, surrounded by a guard of armed men and several horsemen, with drums beating to prevent the multitude from hearing any thing they might say. ‘ Glorious signs of heavenly joy

and gladness were beheld in the countenances of these three persons, who walked hand in hand, Mary being the middlemost.' Nothing could exceed the exultation with which they went forth to die; and they called on all to witness that they suffered for the cause of truth. 'This,' said Mary Dyer, 'is an hour of the greatest joy I ever knew, no ear can hear, no tongue can utter, and no heart can understand the sweet refreshings of the spirit of the Lord which I now feel.' The last words of Robinson were, 'I suffer for Christ, in whom I live and for whom I die.' Stephenson said, 'This day shall we be at rest with the Lord.' Mary Dyer saw her two companions die before her eyes; and ascended the ladder to meet her own fate. Every thing was ready; the rope adjusted to her neck, her extremities tied and her face covered, when a faint shout was heard in the distance, which grew stronger and stronger, and was soon caught and repeated by a hundred willing hearts. 'A reprieve, a reprieve,' was the cry, and the execution was stopped; but she, whose mind was intently fastened on another world, cried out, that she desired to suffer with her brethren, unless the magistrates would repeal their wicked law."

Nothing can prove more clearly the force of the religious feeling which animated her. Our readers must be familiar with the story of the criminal who, when a reprieve was announced under similar circumstances, was found to have died of fright; and we have been informed by persons officially conversant with executions, that nine out of ten ascend the scaffold in a state of complete insensibility.

"She was saved by the intercession of her son, but on the express condition that she should be carried to the place of execution and stand upon the gallows with a rope about her neck, and then be carried out of the colony. She was accordingly taken home to Rhode Island; but her resolution was still unshaken, and she was again moved to return to the 'bloody town of Boston,' where she arrived in the spring of 1660. This determination of a feeble and aged woman, to brave all the terrors of their laws, might well fill the magistrates with astonishment; but the pride of consistency had already involved them in acts of extreme cruelty, and they thought it impossible now to recede. The other executions were considered acts of stern necessity, and caused much discontent; a hope was entertained till the last moment, that the condemned would consent to depart from the jurisdiction; and when Mary Dyer was sent for by the court, after her second return, Governor Endicott said, 'Are you the same Mary Dyer that was here before?'

giving her an opportunity to escape by a denial of the fact, there having been another of the name returned from England. But she would make no evasion. 'I am the same Mary Dyer that was here the last general court.' 'You will own yourself a Quaker, will you not?' 'I own myself to be reproachfully called so;' and she was sentenced to be hanged on the morning of the next day. 'This is no more than thou saidst before,' was her intrepid reply, when the sentence of death was pronounced. 'But now,' said the governor, 'it is to be executed; therefore prepare yourself, for to-morrow, at nine o'clock, you die!'"

He was as good as his word. "She hangs as a flag for others to take example by," said a member of the court, as the lifeless body hung suspended from the gallows.

The fate of William Leddra is equally striking. After several severe whippings and a tedious imprisonment, he had been banished on pain of death, but soon returned and appeared publicly in Boston; he was immediately seized and chained to a log of wood in prison, where he suffered much from the cold during the winter months. In March, 1661, he was brought to trial before the court of assistants, in Boston. His offence of being a Quaker and returning after banishment on pain of death, was stated to him, when he demanded what evil he had done. The reply was that he had abused authority; he had refused to take off his hat in court, and would say 'thee' and 'thou.' 'Will you put me to death,' he asked, 'for speaking good English, and for not putting off my clothes?' 'A man may speak treason in good English.' 'Is it treason to say "thee" and "thou" to a single person?' 'Will you return to England?' demanded Broadstreet. 'I have no business there,' was the reply. 'Then you shall go that way,' pointing to the gallows. 'Will you put me to death for breathing in the air of your jurisdiction? What have you against me? I appeal to the laws of England for my trial. If by them I am guilty, I refuse not to die.' But twenty years before it had been 'accounted perjury and treason to speak of appeals to the king,' and a sneering remark was made on the present occasion, which was long remembered by Charles II., whose royal ear it soon reached. "This year you appeal to England; the next, parliament will send over to inquire; and the third year, the government of England will be changed."

The ordinary punishment inflicted on the female offenders was whipping at the cart's tail, without much regard to decency. Thus, of Lydia Wardell, the lady who entered the church in a state of nudity, we are told: "She was accordingly stripped and tied with her naked breasts against the splinters of the post, and lashed with more than a score of stripes, 'which, though they miserably tore her bruised body, were yet to the great comfort of her husband and friends, who, having unity with her in those sufferings and in the cause of them, stood by to comfort her in so deep a trial.' In the same year, Deborah Wilson, a young and respectable married woman, made a similar display in the streets of Salem, for which she was sentenced to be tied to the cart's tail and whipped with her mother and sister, who, it was said, had counselled her. Her young husband, who was not a Quaker, followed after, sometimes thrusting his hat between the whip and her back."

The cases of witchcraft differ very slightly from those by which the annals of our own criminal jurisprudence are stained; and it would be singular if the legislative assemblies, judges and juries of America, had been free from a superstition which subdued the understanding of a Hale, and resisted the progress of intelligence in Great Britain till the middle of the last century. So late as 1716, one Mrs. Hicks, and her daughter, nine years of age, were hanged for selling their souls to the devil, and raising a storm by pulling off stockings and making a lather of soap; and in 1743, the repeal of the penal laws against witchcraft was denounced by the presbytery in Edinburgh as a national sin.

The trial of Thomas Maule, before the superior Court at Salem, Massachusetts, 1696, for a slanderous publication and blasphemy, is principally remarkable for the spirit and legal acuteness of the defence.

"*Maule.*—Jurymen, look well to the work which you are now about to do. The case is committed to you, who are to be governed by the king's law. No part of that law have I broken. The book is no evidence in law against me, further than you are satisfied that I have written any thing contrary to sound doctrine and inconsistent with the Holy Scriptures. If you favour any of the unjust charges of the judges against me, and say there is such matter in the book as they charge me with, you must go to the printer for satisfaction,

for I am ignorant of any such matter in the book. My hand is only to my copy, which is in the hands of the printer in another government, and my name in the printed book does not in law prove the same to be Thomas Maule, any more than the spectre evidence is in law sufficient to prove a person accused by such evidence to be a witch. Look well, therefore, to your work, for you have sworn true trial to make and just verdict to give. If you do me injustice, the fault will be your own, for these my accusers on the bench are but as clerks to say 'amen' to what you do.

"This bold address to the jury accomplished its purpose. They soon returned a verdict of not guilty, at which the judges expressed much dissatisfaction, and asked how they could return such a verdict with the book before them? They replied, that the book was not sufficient evidence, for Thomas Maule's name was placed there by the printer. Besides, the matter contained in it was not cognizable by them, who were not a jury of divines, which this case required.

"*Justice Danforth.*—Thomas Maule may escape the hands of men, but he has not escaped the hand of God, who will find out all his evils and blasphemies against his church and people; and has reserved him for further judgment.

"*Maule.*—I am in no way guilty of your charge, but have great cause to praise God for my deliverance by the jury who are made instruments of freeing me out of the hands of them, who have manifested their unrighteous works against the people of God and the king's subjects, as their fathers did before them.

"*Justice Danforth.*—Take him away; take him away."

The trial of John Peter Zenger is regarded as an era in American history, on account of the principles expounded by the defendant's counsel, Mr. Hamilton. At the period in question, 1732, the governor (Crosby) and his council had contrived to become extremely unpopular; and the *Weekly Journal*, printed by Zenger, was the chief organ of their enemies. After trying in vain to induce the grand jury to find a bill against him, the authorities were obliged to adopt the arbitrary course of an information by the attorney-general of the province.

"James Alexander and William Smith, the counsel of Zenger, and popular leaders, immediately filed exceptions to the commissions of the judges: first, to the tenure, which was at will and pleasure, instead of during good behaviour; second, to the investiture; third, to the form; fourth, to the want of evidence that the council concurred with the governor in their appointment. When the

counsel of the prisoner presented these exceptions, and moved that they be filed, the chief justice warned them of the consequences. They boldly and firmly answered that they had well considered their course and would abide the consequences. 'I am so well satisfied,' was the declaration of one of them, 'of the right of the subject to take exception to the commission of a judge if he think such commission illegal, that I will stake my life on the point. The validity of the exceptions in the present case is another matter. I am ready to argue the point when the court will hear me.' The subject was deferred to the next morning, when the counsel of Zenger again asked leave to argue the point. 'We will neither hear you, nor allow the exceptions,' was the reply of the chief justice; 'you think to gain popularity and the applause of the people by opposing this court. The matter has come to the point, that we must leave the bench, or you the bar.' An order was immediately passed, excluding them from any farther practice in the court, and their names were struck from the roll of attorneys."

This only served to put Zenger and his friends upon their mettle, and they immediately sent to Philadelphia, and retained Alexander Hamilton, a distinguished barrister of that day, educated in England, and filling a position which rendered it impossible to deny him a fair hearing. He was eighty at the time, but his energy was unabated, and his legal knowledge unimpaired. Hamilton at once admitted the publication, and stood upon the right of the subject to discuss fully and freely the measures and motives of the government. He concluded as follows:

"Power may justly be compared to a great river, which, while kept within its due bounds, is both beautiful and useful; but when it overflows its banks, it is then too impetuous to be stemmed, it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men (who value freedom) use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust and boundless ambition, the blood of the best men that ever lived.

"I hope to be pardoned, Sir, for my zeal upon this occasion; it is an old and wise caution, that when our neighbour's house is on fire, we ought to take care of our own. For though, blessed be God, I live in a government where liberty is well understood, and freely enjoyed: yet experience has shown us all (I am sure it has to me) that a bad precedent in one government is soon set up for

an authority in another; and therefore I cannot but think it mine, and every honest man's duty, that (while we pay all due obedience to men in authority) we ought at the same time to be upon our guard against power, wherever we apprehend that it may affect ourselves or our fellow subjects.

"I am truly very unequal to such an undertaking on many accounts. And you see I labour under the weight of many years, and am borne down with great infirmities of body; yet, old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my service could be of any use in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive a people of the right of remonstrating (and complaining too) of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and prosecutions. I wish I could say there were no instances of this kind. But to conclude: the question before the court and you, gentlemen of the jury, is not of small nor private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying; no! it may, in its consequences, affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery, will bless and honour you, as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbours, that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power in these parts of the world, at least by speaking and writing truth."

Much of the argument turned on the admissibility of the truth in evidence. It was excluded in accordance with English law, but the doctrine has since received important modifications in America. In Massachusetts the defendant may give the truth in evidence, but to complete the defence he must go further, and show that the alleged libel was published from a good motive or for a justifiable end. In the constitutions of Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana, and Illinois, it is expressly provided, that in prosecutions for libels on public men, the truth may be given

in evidence, when the matter published is proper for public information; a vague and unsatisfactory mode of solving the problem.

"The New York Negro Plot" comes next. It was as much a delusion as our famous Popish plot, which may well suggest an excuse as well as a parallel. If London could be hurried into a disgraceful series of judicial prosecutions by one false alarm, New York may be forgiven for being driven into a passing phrenzy by another; and it must be admitted that New York was more likely to suffer from a negro conspiracy, than London from a rising of Roman Catholics.

In 1712 there had been an insurrection of the slaves, who burnt a house and murdered some of their white masters, though they were speedily suppressed by the soldiery. This gave a colour to the apprehensions excited in 1741, the era of the supposed plot. In the February of that year, several fires broke out in quick succession, which were obviously the work of incendiaries; and as no other class was equally open to suspicion, these were attributed to the slaves. "It happened," says Mr. Chandler, "that a Spanish vessel, partly manned with negroes, had previously been brought into New York as a prize, and all the men had been condemned as slaves in the court of admiralty, and were sold at vendue; 'now these men had the impudence to say, notwithstanding they were black, that they were freemen in their own country, and to grumble at their hard usage in being sold for slaves.' One of them had been bought by the owner of a house in which fire was discovered, and a cry was raised among the people, 'the Spanish negroes, the Spanish! take up the Spanish negroes!' They were immediately incarcerated, and a fire occurring in the afternoon of the same day, the rumour became general, that the slaves in a body were concerned in these wicked attempts to burn the city.

"The military were turned out, and sentries were posted in every part of the city, while there was a general search of the houses, and an examination of suspicious persons. The lieutenant-governor, at the request of the city authorities, offered a reward of one hundred pounds and a full pardon to any free white person who should discover the persons concerned in

these incendiary acts, and freedom with a reward of twenty pounds to any slave who should make the same discovery. The offer was tempting, and, at the ensuing session of the superior court, Mary Burton, the servant of Hughson, made a statement before the grand jury, to the effect that three negroes, Cæsar, Prince and Cuffee, were accustomed to meet at her master's, and had made a plan to burn the whole city and massacre the inhabitants. She had seen a large number of negroes at the same place, who were all in the conspiracy, and there were in her master's house a quantity of fire arms. The only white persons concerned were her master, his wife, and Peggy Carey. The former was to be king, and Cæsar was to be governor. At one of the meetings she heard Cuffee say, 'that a great many people had too much, and others too little;' and he intimated that such an unequal state of things should not long continue.

"When this statement was made known to the court, they immediately summoned all the lawyers in the city to consult upon the measures most proper to be adopted in this emergency. By a law of the colony, negroes might be tried for any offence in a summary way; 'but, as this was a plot in which white people were confederated with them, and most probably were the first movers and seducers of the slaves, there was reason to apprehend a deeper design than the slaves themselves were capable of; and it was judged most advisable that it should be taken under the care of the supreme court.' Accordingly application was made to the lieutenant-governor for an ordinance to enlarge the term of the supreme court; and the bar unanimously offered their assistance on every trial in their turn, 'as this was conceived to be a matter that not only affected the city, but the whole province.'

"Meanwhile the examinations and confessions were increasing every day. Peggy Carey, the wretched prostitute, being implicated, was examined by the judges in prison. She was promised pardon and reward if she would confess and expose the rest; but she said, 'that if she should accuse any body of any such thing, she must accuse innocent persons, and wrong her own soul;' and she denied all knowledge of the

fires. But upon being convicted as a receiver of stolen goods, she 'seemed to think it high time to do something to recommend herself to mercy,' and made a voluntary confession, in which she changed the scene of the plot from Hughson's to John Romme's, a shoe maker, and the keeper of a low tavern, where she said several negroes used to meet, to whom Romme administered an oath; and they were to attempt to burn the city, but if they did not succeed, they were to steal all they could, and he was to carry them to a strange country and give them their liberty. All the slaves mentioned by her were immediately arrested.

The two negroes, Quack and Cuffee, were first brought to trial, Mary Burton playing the part of Titus Oates, and the president of the court enacting that of chief justice Scroggs with full effect. "You that were for destroying us without mercy (so ran the sentence)—you abject wretches, the outcasts of the nations of the earth are treated here with tenderness and humanity; and, I wish I could not say with too great indulgence, for you have grown wanton with excess of liberty, and your idleness has proved your ruin, having given you the opportunities of forming this villanous and detestable conspiracy. What hopes can you have of mercy in the other world, for shall not the Judge of all the earth do right?"

Hughson, with his wife and daughter, and Peggy Carey, were tried next. They had no counsel, and almost every member of the bar appeared against them. A single paragraph from the Attorney-General's speech will show the spirit of the prosecutors :

" 'Such a monster,' he said, 'will this Hughson appear before you, that for the sake of the plunder he expected by setting in flames the king's house, and this whole city, he, remorseless he! counselled and encouraged the committing of all these most astonishing deeds of darkness, cruelty and inhumanity—infamous Hughson! Gentlemen, this is that Hughson, whose name and most detestable conspiracies will no doubt be had in everlasting remembrance, to his eternal reproach, and stand recorded to the latest posterity. This is the man! This, that grand incendiary! That arch rebel against God, his king, and his country! That devil incarnate, and chief agent of the Abaddon of the infernal pit and regions of darkness.' "

The prisoners protested their innocence, but were all found guilty and sentenced to be hanged.

“ ‘ Good God ! ’ exclaimed the judge, in pronouncing sentence, ‘ when I reflect on the disorders, confusion, desolation, and havoc, which the effect of your most wicked, most detestable, and diabolical counsels might have produced, had not the hand of our great and good God interposed, it shocks me ; and you, who would have burnt and destroyed without mercy, ought to be served in a like manner. ’ ”

Several batches of negroes, of four five or six each, were tried, condemned and burnt at the stake within a month or two. “ On the nineteenth of June, the lieutenant-governor offered a full pardon to all who would make a confession before the first of July. The poor negroes, being extremely terrified, were anxious to take the only avenue of safety that was offered, and each strove to tell a story as ingenious and horrible as he could manufacture. ‘ Now,’ says the historian of the plot, ‘ many negroes began to squeak, in order to lay hold of the benefit of the proclamation. Some who had been apprehended, but not indicted, and many who had been indicted and arraigned, who had pleaded not guilty, were disposed to retract their pleas and plead guilty, and throw themselves on the mercy of the court.’ In one week after the proclamation there were thirty additional slaves accused ; and before the fifteenth of July, forty-six negroes, on their arraignment at different times, pleaded guilty. Suspected slaves were daily arrested, until at length the prison became so full that there was danger of disease, and the court again called in the assistance of the members of the bar, who agreed to bear their respective shares in the fatigue of the several prosecutions.”

To keep the delusion alive as long as possible, the cry of Popery was added, and John Ury, a non-juring clergyman of inoffensive life, was charged with being an emissary of the Jesuits, sent to New York for the express purpose of assisting in the plot. The tone adopted by the attorney-general, Bradley, was to the last degree extravagant. After enumerating the particulars of the charge, he went on :

“ Gentlemen, what I have alleged, and much more, you will hear fully proved against the prisoner by the witnesses for the king on this trial ; but before we enter upon their examination, give me

leave to say a few words concerning the heinousness of this prisoner's offences, *and of the Popish religion in general*; which I shall speak but very briefly to, as there are several other gentlemen of counsel for the king on this trial, and as I have not had either health or leisure to prepare to say much on this occasion."

He kept his word so far as the Popish religion was concerned.

"Then they have their doctrine of transubstantiation, which is so big with absurdities that it is shocking to the common sense and reason of mankind; for were that doctrine true, their priests, by a few words of their mouths, can make a god as often as they please; but then they eat him too; and this they have the impudence to call honouring and adoring of him. Blasphemous wretches! For hereby they endeavour to exalt themselves above God himself, inasmuch as the creator must necessarily be greater than his creature.

"These and many other juggling tricks they have in their hocus pocus, bloody religion; which have been stripped of all their wretched disguise, and fully exposed in their own colours by many eminent divines, but more particularly by the great Dr. Tillotson, whose extraordinary endowments of mind, his inimitable works, and exemplary piety and charity, have gained him such universal esteem and applause throughout all the Protestant world, as no doubt will endure as long as the Protestant name and religion last, which I hope will be to the end of time."

The prisoner made an able and conclusive defence, pointing out the utter incredibility of the stories told by the witnesses, and exposing the error, into which the prosecutors had fallen, of confounding non-juring priests with Popish priests; but he was found guilty and executed, protesting his innocence.

Leisler's Rebellion, as the report is headed, is a curious case of injustice. He was the leader of the party who in 1689 rose against the authorities and declared for William and Mary; but happening to hold out a little longer than was strictly necessary, he and two members of his family were brought to trial as rebels against the very dynasty they had exerted themselves to establish. They were condemned, but the governor (Slaughter) hesitated to sign the death-warrant. To remove this difficulty, the enemies of the prisoners invited his Excellency to an entertainment, made him drunk, procured his signature, and hurried on the execution before he recovered

his senses. His son vowed vengeance, and in the course of time the fitting opportunity presented itself. From the next case, Colonel Bayard's Treason, it appears that the aristocratic party opposed to Leisler had procured a law to be passed in 1691, declaring that any person who, under any pretence whatever, should endeavour to disturb the peace of government, he should be deemed a traitor. One of the originators of this law, Colonel Bayard, was the first to incur the penalty. *Quam facile in nosmet legem sancimus iniquam.*

Lord Bellamont, the governor, having shown some inclination to favour young Leisler, Bayard, who had been mainly instrumental in bringing about the execution of the father, procured addresses to the king, the parliament, and the expected governor (Lord Cornbury), in which the most scandalous charges were brought against the provincial government for the time being. The lieutenant-governor and the council, the principal objects of this attack, immediately ordered a prosecution under the law of 1691. The attorney-general, a member of the opposite faction, refused to conduct it, but his refusal proved of no advantage to the accused. The solicitor-general undertook the office, and more than compensated for his colleague's backwardness. "When the grand jury were called," says Mr. Chandler, "the prisoner's counsel objected to some of them, for having declared 'that if Bayard's neck was made of gold he should be hanged,' at the same time boasting that they were of the jury; but the objection was immediately overruled. A part of the jury insisted that they had a right to deliberate alone, whereupon the solicitor-general took down their names and threatened that he 'would cause them to be trounced,' and the jury broke up in confusion without acting. The solicitor-general then complained to the court that four of the jury insisted that he should not be present at their deliberations; and the court ordered them to be forthwith discharged. Still the jury hesitated to find a bill of indictment; and when they did return one into court, it was immediately objected that the competent number had not voted for it; and it appeared by the statement of eight of the nineteen jurors, that they had not voted in favour of it. But the court decided that the

indictment had been regularly returned ; it was thus a matter of record, and no averment against it could be received."

The trial was conducted with the same disregard of justice or even decency. "The prisoner, upon his arraignment, pleaded not guilty, and desired that he might be allowed two clerks to take the minutes of the trial. The request was denied. 'I find it was allowed my Lord Russel and others,' he said, 'to employ clerks. I pray the same liberty.' 'It was allowed my Lord Russel,' was the reply, 'but you would not be willing to meet with the hardships of his trial.'"

It was urged in his defence that no address or petition, *bonâ fide* intended as such, could amount to treason ; but his own law was retorted on him ; the jury were misled or brow-beaten into a verdict of guilty ; and the chief justice, with evident satisfaction, pronounced sentence as follows :

" 'It is considered by the court here, that you be carried to the place from whence you came ; that from thence you be drawn upon an hurdle to the place of execution ; that there you be hanged by the neck, and being alive, you be cut down upon the earth, and that your bowels be taken out of your belly, and your privy members be cut off, and you being alive, they be burnt before your face ; and that your head be cut off, and that your body be divided into four quarters ; and that your head and quarters be placed where our lord the king shall assign. And the Lord have mercy upon your soul.'

" 'I desire to know,' demanded the prisoner, 'whether I have leave to answer your honour's speech, made before sentence ?' 'No.' 'Then,' he exclaimed, 'God's will be done,' and was immediately removed to prison."

He was notwithstanding reprieved until the pleasure of the King could be ascertained ; and on the arrival of the new governor he was released and reinstated in his former estate and honour, "as if no such trial had been had."

On the 5th March, 1770, a party of soldiers, of the 29th British Regiment of Foot, fired upon a mob in Boston, and killed five persons. This is popularly called the Boston massacre. It gave rise to three trials, that of Captain Preston, the commander of the party, that of the soldiers under him, and that of some soldiers who were supposed to have fired from the

custom-house. They were all acquitted, highly to the honour of the jurymen, who sternly did their duty, unawed by the almost unparalleled excitement of the province. The only trial of which any report has been preserved is that of the soldiers under the command of Captain Preston. This was taken in shorthand, and fills the last hundred and fourteen pages of Mr. Chandler's compilation.

The prosecution was conducted by Robert Paine and Samuel Quincy; John Adams (afterwards President), Josiah Quincy, junior, and Sampson Blower, appeared as counsel for the prisoners. A few passages from the speeches for the defence may not be uninteresting at the present season, when the soldiery are constantly liable to be called to act against the populace. The following is from Mr. Quincy's speech :

" And here, gentlemen, let me again inform you, that the law which is to pass upon these prisoners, is a law adapting itself to the human species, with all their feelings, passions, and infirmities; a law which does not go upon the absurd supposition, that men are stocks and stones; or that in the fervour of the blood, a man can act with the deliberation and judgment of a philosopher. No, gentlemen: the law supposes that a principle of resentment, for wise and obvious reasons, is deeply implanted in the human heart; and not to be eradicated by the efforts of state policy. It, therefore, in some degree, conforms itself to all the workings of the passions, to which it pays a great indulgence, so far as not to be wholly incompatible with the wisdom, good order, and the very being of government.

" Keeping, therefore, this full in view, let us take once more, a very brief and cursory survey of the matters supported by the evidence. And, here, let me ask sober reason—what language more opprobrious—what actions more exasperating, than those used on this occasion? Words, I am sensible, are no justification of blows, but they serve as the grand clues to discover the temper and the designs of the agents; they serve also to give us light in discerning the apprehensions and thoughts of those who are the objects of abuse.

" ' You lobster,' ' you bloody back,' ' you coward,' and ' you dastard,' are but some of the expressions proved. What words more galling? what more cutting and provoking to a soldier? To be reminded of the colour of his garb, by which he was distinguished from the rest of his fellow citizens; to be compared to the

most despicable animal that crawls upon the earth, was touching indeed a tender point. To be stigmatised with having smarted under the lash at the halbert; to be twitted with so infamous an ignominy, which was either wholly undeserved, or a grievance which should never have been repeated: I say, to call upon and awaken sensations of this kind, must sting even to madness. But accouple these words with the succeeding actions,—‘ You dastard,—you coward!’ A soldier and a coward! This was touching (with a witness), ‘ the point of honour, and the pride of virtue.’ But while these are as yet fomenting the passions, and swelling the bosom, the attack is made; and probably the latter words were reiterated at the onset; at least, were yet sounding in the ear. Gentlemen of the jury, for heaven’s sake, let us put ourselves in the same situation! Would you not spurn at that spiritless institution of society which should tell you to be a subject at the expense of your manhood?

“ But does the soldier step out of his ranks to seek his revenge? Not a witness pretends it. Did the people come within the points of their bayonets, and strike on the muzzles of the guns? You have heard the witnesses.

“ Does the law allow one member of the community to behave in this manner towards his fellow citizen, and then bid the injured party be calm and moderate? The expressions from one party were—‘ Stand off—stand off!’ ‘ I am upon my station.’ ‘ If they molest me upon my post, I will fire.’ ‘ By God I will fire!’ ‘ Keep off!’ These were words likely to produce reflection and procure peace. But had the words on the other hand a similar tendency? Consider the temper prevalent among all parties at this time. Consider the then situation of the soldiery; and come to the heat and pressure of the action. The materials are laid, the spark is raised, the fire enkindles, the flame rages, the understanding is in wild disorder, all prudence and true wisdom are utterly consumed. Does common sense, does the law, expect impossibilities? Here, to expect equanimity of temper, would be as irrational, as to expect discretion in a mad man. But was any thing done on the part of the assailants, similar to the conduct, warnings, and declarations of the prisoners? Answer for yourselves, gentlemen. The words, reiterated all around stabbed to the heart; the actions of the assailants tended to a worse end; to awaken every passion of which the human breast is susceptible. Fear, anger, pride, resentment, revenge, alternately, take possession of the whole man. To expect, under these circumstances, that such words would assuage the

tempest, that such actions would allay the flames—you might, as rationally, expect the inundations of a torrent would suppress a deluge, or rather, that the flames of Etna would extinguish a conflagration !”

Mr. Adams strongly pressed the same topic ; and dealt uncompromisingly with another which it required some boldness to discuss even at that period in the United States :

“ ‘ We have been entertained,’ he exclaimed, ‘ with a great variety of phrases, to avoid calling this sort of people a mob. Some call them shavers, some call them geniuses. The plain English is, gentlemen, most probably, a motley rable of saucy boys, negroes, and mulattoes, Irish teagues and outlandish jack tars. And why we should scruple to call such a set of people a mob, I cannot conceive, unless the name is too respectable for them. The sun is not about to stand still or go out, nor the rivers to dry up, because there was a mob in Boston on the fifth of March that attacked a party of soldiers.’ ”

We give a specimen of his masterly mode of treating the evidence :

“ In regard to Montgomery, the evidence was clear that he was personally assaulted and knocked down before he fired. When the multitude was shouting and huzzaing, and threatening life, the bells ringing, the mob whistling, screaming, and rending like an Indian yell ; the people from all quarters throwing every species of rubbish they could pick up in the street, and some who were quite on the other side of the street throwing clubs at the whole party ; Montgomery in particular, smitten with a club and knocked down, and as soon as he could rise and take up his firelock, struck on his breast or shoulder by another club from afar, what could he do ? Did the jury expect he should behave like a stoic philosopher lost in apathy—patient as Epictetus, while his master was breaking his legs with a cudgel ? It was impossible they should find him guilty of murder. They must suppose him divested of all human passions, if they did not think him at the least provoked, thrown off his guard, and into the *furor brevis*, by such treatment as this.

“ Attacks, whom Montgomery was supposed to have killed, appeared to have undertaken to be the hero of the night, and to lead this army with banners, to form them in the first place in Dock Square, and march them up to King Street with their clubs. They passed through the main street up to the main guard, in order to

make the attack. If this was not an unlawful assembly, there never was one in the world. Attucks, with his myrmidons, comes round Jackson's corner, and down to the party by the sentry box ; when the soldiers pushed the people off, this man with his party cried, ' do not be afraid of them, they dare not fire, kill them ! kill them ! knock them over !'—and he tried to knock their brains out. It was plain the soldiers did not leave their station, but cried to the people, ' stand off.' Now to have this reinforcement coming down under the command of a stout mulatto fellow, whose very looks were enough to terrify any person, what had not the soldiers then to fear ? He had hardiness enough to fall in upon them, and with one hand took hold of a bayonet, and with the other knocked the man down. This was the behaviour of Attucks ; to whose mad proceedings, in all probability, the dreadful carnage of that night was chiefly to be ascribed. And it was in this manner this town had been often treated ; a Carr from Ireland, and an Attucks from Framingham, happening to be here, shall sally out upon their thoughtless enterprises, at the head of such a rabble of negroes and worthless characters as they can collect together, and then there were not wanting persons to ascribe all their doings to the good people of the town."

He concluded in these terms :

" I will enlarge no more on the evidence, but submit it to you. Facts are stubborn things ; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence. Nor is the law less stable than the fact ; if an assault was made to endanger their lives, the law is clear, they had a right to kill in their own defence ; if it was not so severe as to endanger their lives, yet if they were assaulted at all, struck and abused by blows of any sort, by snow balls, oyster shells, cinders, clubs, or sticks of any kind ; this was a provocation, for which the law reduces the offence of killing down to manslaughter, in consideration of those passions in our nature, which cannot be eradicated. To your candour and justice I submit the prisoners and their cause. •

" The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course ; it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. To use the words of a great and worthy man, a patriot, and an hero, an enlightened friend of mankind, and a martyr to liberty ; I mean Algernon Sidney, who from

his earliest infancy sought a tranquil retirement under the shadow of the tree of liberty, with his tongue, his pen, and his sword : 'The law,' says he, 'no passion can disturb. 'Tis void of desire and fear, lust and anger. 'Tis *mens sine affectu* ; written reason ; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but without any regard to persons, commands that which is good, and punishes evil in all, whether rich or poor, high or low,—'Tis deaf, inexorable, inflexible.' On the one hand it is inexorable to the cries and lamentations of the prisoners ; on the other it is deaf, deaf as an adder, to the clamours of the populace."

Mr. Chandler reasonably enough takes pride to his country and himself for the result of these trials. They certainly prove that the principles of fair and evenhanded justice had taken root in the United States almost, if not quite, as soon as in the mother country, and rebut the inferences that might otherwise be drawn from the other cases we have been analyzing or abstracting, in which the result is uniformly decided by the personal feelings of the tribunal or the political position of the accused. How far the judges and juries of the United States have risen superior to such influences since they became a nation, will probably appear from the future volumes of Mr. Chandler's work, and these, we trust, will redeem the pledge implied in his preface, that "if his cases do not prove interesting, it will not be for want of rich materials to render them so." We frankly own that this, the first volume, has disappointed us.

H.

ART. II.—A BILL FOR AMENDING THE REGISTRATION OF
PARLIAMENTARY ELECTORS.

A Bill to amend the Law which regulates the Registration and Qualification of Parliamentary Electors in England and Wales. 10th August, 1842. (Prepared and brought in by Sir J. Graham, and Mr. Attorney-General and Mr. Solicitor-General.)

THE Bill, of which the above is the title, was brought into the House of Commons at the close of the last session by the Secretary of State for the Home Department, and read a first time, for the purpose of being printed and circulated, preparatory to its reintroduction as a government measure at an early period of the ensuing session. It comes therefore peculiarly within our province to consider its provisions, and point out how far in our judgment it comes up to or falls short of that which is stated in the preamble to be its object, viz. "*the amendment of some of the provisions of the Reform Act, and the making of further provision for the registration of persons entitled to vote in the election of members to serve in parliament for England and Wales.*"

To reform the Reform Act is a task of no ordinary difficulty; witness the fate of the many bills with the same or a similar title, which the late government year after year presented to parliament. Some of these had for their object the settling by declaratory enactments certain points of election law arising out of the Reform Act, upon which the revising barristers differed in opinion; others pointed principally to the establishment of a court of appeal as a means of securing uniformity of decision among the barristers; while, again, some were to alter the constitution of the revision courts, vest the patronage in the Chancellor, and to create a sort of perpetual peripatetic court, which should travel round the country at all seasons of the year, putting every thing and every body out of order and out of tune. The fate of these bills it was not difficult to foresee, and we very much doubt if their authors ever contemplated any other fate than that which befell them. The almost perennial introduction of one or other of them is equally easy of explanation: murmurs arose against the Reform Act, as having fallen short of the expectations which had

been formed of it. The Conservatives, on their side, smarting under the loss of the scheduled boroughs, were only too happy to join in any cry which should manifest the imperfection of the measure, while the ultras of the other party, early disenchanted and disgusted with the checks which it presented to the hoped for universal enjoyment of the suffrage, railed now at the system of registration itself, now at the barristers who revised the lists; to-day it was the required payment of rates which was in fault, to-morrow it would be the difference of opinion among the revising barristers which created all the mischief. The Act in short fell into disrepute; article after article appeared in the newspapers, finding fault now with this matter, now with that; editorial and leading paragraphs were written to impress upon government the necessity of an immediate change either in the mode of registration or in that of revision. The pressure from without became troublesome, something must be done to stave off importunities, and the government of the day, session after session, produced their annual but ever-changing panacea in the shape of a bill to remedy those supposed defects which had been the most recently pressed upon their attention.

That the Whig government, however, considered any alteration of the system of registration as settled by the Reform Act to be for their interest, we do not believe; their opinion upon that point is to us abundantly apparent as well from their never adhering two successive sessions together to the same plan of amendment, as from the glaring defects in the bills themselves when presented to parliament, which precluded the possibility of their ever becoming law; but public opinion, guided as it always is by the press, and on that occasion by the press of both parties, was too strong for them; as each season of repose from active political warfare returned, in the interval between the revision of the Lists and the re-assembling of Parliament, a constant running fire was kept up; and the consequence was, that in each returning session, according as the pressure against one supposed grievance or another was the strongest, one or other of the bills for amending the registration was withdrawn from the pigeon holes of the Home Office and presented to parliament, in the hope, we are convinced, as well as in the assurance, of its safe rejection.

Looking at the Bill before us, we suspect that some of these defunct Whig bills still encumber the shelves of the Home Office, for we perceive therein many clauses similar to, if not identical with, those of its predecessors, and it would not surprise us if to the presence alone of these bills as reliquiae in the office, and not to any well assured conviction of any change in the system of registration being necessary, is to be attributed the bringing in of this very Bill now before us. The necessity for any change at all has been very much doubted; it is our own opinion (in which we happen to know that we are supported by some of the first names in the profession) that, with the exception of a few matters which might be provided for in a short act of a dozen clauses, not only is no alteration whatever requisite in the machinery of the Reform Act, but that any alteration is likely to be attended with more doubt and confusion than the Home Secretary even may profess to remedy.

Its merits or demerits as an act of political wisdom it is not our province on the present occasion to discuss; but as respects the machinery of the Act and the working thereof, (we allude more especially to the placing the names of the voters upon the lists, and the expunging them therefrom,) it has always appeared to us perfectly well calculated to effect its object,—far more so than any of the proposed schemes of improvement which have met our eyes. It is no small merit in those who framed this part of the Act, that, under circumstances of much complication and equal novelty, they should have made each man's right to be upon the register dependent upon himself alone, equally unaffected by the nonfeasance or the misfeasance of any other connected with the formation of the register. Let but an individual do only that which is required of him by the Reform Act towards having his name placed upon the register, and no act of any other party, be he overseer, high constable, clerk of the peace, or any other official, can in any way prejudice or affect his right to be there. It is the same with parties who object to others under the provisions of the Reform Act. The objector is equally independent with the voter of the acts of omission or commission of any other party: let him but adhere to the provisions of the Act,

and he must succeed in bringing the objected voter before the court.

We are aware that these views may appear strange to those of our readers who have been accustomed to hear or read of rights of voters perilled or even lost by the ignorance or negligence of overseers and others; our limits are at present too confined, or we should not have contented ourselves with the naked assertion of the fact, but should have proceeded to shew how in every conceivable instance the *bonâ fide* voter or objector, complying with the provisions of the Act which have reference to his own case, stands independent of every one, unhurt alike by the fraud, the ignorance, or the carelessness of others. To many, however, of our professional friends, practically acquainted with the working of the Reform Act, the fact is as familiar as it is to ourselves, and is indeed the groundwork of their mode of revising the lists.

Entertaining these opinions we awaited both with anxiety and apprehension the introduction of the present measure, at the same time we had hopes that the Conservative Government, while avoiding the errors of its predecessors, would have availed themselves of the increased facilities towards sound amendment afforded by experience, to present a project of law, as our neighbours the French would call it, at once simple in construction, and accurate in expression; and, while it left untouched those parts of the Reform Act which, though not perfect in themselves, practically have worked well, would have introduced sound and permanent improvements, equally adapted to the existing law and capable as well as easy of comprehension by those who are to put it in operation. To what extent these hopes have been realized our readers will have an opportunity of ascertaining if they will follow us in the analysis of the Bill which we are about to lay before them.

The principal features of this bill are—

1. The repeal of such parts of the Reform Act as relate to the formation of the registers of voters, and the substitution of a new system.
2. Limiting the number and standing of the Barristers who are to revise the lists, with a power to them to fine and give costs in certain cases.

3. The creation of a Court of Appeal from the decision of the Revising Barristers.
4. The definition, by declaratory enactments, of certain disputed rights of Electors in Counties and Boroughs.
5. Limiting all inquiry at the time of election to the identity of the Voter, and whether he has voted before at the same election.
6. A provision for the safe custody of the Poll Books, with a view to insure facility of proof before election committees.

The Bill commences with reciting the passing of "An Act to amend the Representation of the People in England and Wales," and then proceeds to state that "Whereas it is expedient that *some of the said provisions* should be amended," (an ominous foretaste of the lack of that accuracy of expression which is eminently important in an act passed for defining political rights), and after repealing so much of the act as concerns the formation of a register of voters for any county, &c., or for any city or borough, proceeds to enact, "*That the clerk of the peace for every county, riding, &c., shall cause a number of forms of warrants, precepts, notices and lists to be printed, according to the respective forms (1, 2, 3, 4, 5, 8) in the Schedule A.; and shall also, within the first seven days of June in every year, make and cause to be delivered his warrant to the high constable of every hundred within his county, and with his warrant a sufficient number of the said forms of precepts, notices and lists, and also a sufficient number of copies of such parts of the register of voters for such county, &c. then in force as shall relate to any parish, &c. within his constablewick.*" It is then enacted, "*that the high constable shall, within eleven days of the receipt of such warrant, make and deliver his precept to the overseers of every parish, &c. within his constablewick, together with a sufficient number of the said printed forms of notices and lists, and of the copies of such part of the said register as shall relate to the respective parish or township.*" There is then a clause requiring overseers annually to publish a notice on or before the 20th June, calling upon parties not upon the register to send in their notices of claim, very similar in effect to the present law, save that it expressly gives a

power "to any person to claim, although he shall be upon the register"—a needless provision, as it seems to us, for we never heard it doubted but that a person might claim for a qualification differing from that for which his name appeared on the register; and the 6th clause is in the following words—
"And be it enacted, that the overseers of the poor of every parish and township shall, on or before the last day of July in every year, make out, according to the form numbered (4) in the said Schedule A., an alphabetical list of all persons who, on or before the 20th day of July then next preceding, shall have claimed as aforesaid; and in every such list the Christian name and surname of every claimant, with the place of his abode, the nature of his qualification and the local or other description of the property, and the name of the occupying tenant thereof, shall be written as the same are stated in the claim, and the said overseers shall, if they have reasonable cause to believe that any such claimant, or any person whose name shall appear in the register of voters then in force for their parish or township, is not entitled to have his name upon the register then next to be made, shall add the word 'objected' before the name of every such person in the margin of such list,¹ and the said overseers shall also add the word 'dead' before the name of any person in the copy of the register of voters then in force for their parish or township whom they shall have reasonable cause to believe to be dead; and the list of claimants being so made, the overseers shall cause a sufficient number of copies of such list and of the copy of the said register of voters to be written or printed, and shall, on or before the 1st day of August, sign and publish the same." (The remainder of the clause provides for the keeping of copies of the list, &c. for inspection.) The 7th

¹ Here we have another instance of what we should almost call an unpardonable inaccuracy of expression; "on the margin of such list." What list? There is but one mentioned, viz. the list of claimants. So that if an overseer wishes to object to a person on the register, he is to write the word "objected" before his name on a list where it has no business to be found. It is easy to conjecture what was meant by the expression "such list;" but then it is an admitted rule that the intention of the legislature is to be gathered from the language which they have employed to express that intention, and not from any conjecture as to the meaning of doubtful terms.

clause expressly exempts claimants of a county franchise from the necessity of paying the shilling required by the Reform Act, but why it was inserted we are at a loss to divine, since that part of the Reform Act is expressly repealed by this Bill; and then comes the 8th clause, which enacts that the list of claimants (if any) so to be made out, and the copy of the register for the time being relating to the same parish or township, shall be deemed to be the List of Voters of such parish or township. The 9th clause gives to all persons who are on the register (not, as heretofore, on the list or claiming to be put upon it) a power of objecting to others, every person so objecting giving a notice in writing thereof, according to a form specified, to the overseers; "and the person so objecting, and the said overseers in case of their objecting to any person as aforesaid," are to give a notice in writing, according to a form specified in the schedule, "to the person objected to, either by delivering the same or causing the same to be delivered to him, or by leaving the same or causing the same to be left at his place of abode, as described in such list or register; and wherever the place of abode of the person objected to as described in the list or register shall not be in the parish or township to which such list or register may relate, and the name of the occupying tenant of any part of the qualifying property shall appear in such list or register, and such occupying tenant shall reside in the same parish or township to which such list or register may relate, a duplicate notice signed as aforesaid is to be delivered to or left at the usual place of abode of such tenant;" with a proviso, that it shall be sufficient in every case of notice to every person objected to, or occupying tenant, if the notice or duplicate be sent by the post free of postage, or the sum chargeable as postage for the same being first paid, directed to the person to whom the same shall be sent, at his place of abode as aforesaid, or in case of notice to overseers, directed to the overseers of the parish or township to which such list or register may relate. The overseers are then, by the tenth clause, to include the names of *all* persons objected to (not, as now, the names of those *only* who are objected to by third parties) in a list of objections and to publish the same, and this (with the exception of a particular enactment as to what is to be deemed a

publication of notices, lists and registers, and for how long a period of time each is to be published) concludes the provisions relating to the formation of the registers of county electors, previous to the lists being transmitted through the high constable to the clerk of the peace, to be by him laid before the barrister for revision.

If by the words "to amend" be meant to "alter for the better," we can give but a qualified approval to the so-called amendments upon the present system of registration to be found in the above abstract; with the exception of that part which requires the clerk of the peace to furnish overseers with copies of the register and copies of the notices and lists which they are to publish, we can find little which merits the name of *amendment*; novelties certainly, and unnecessary ones, in our judgment, have been introduced, while those parts which we may almost say solicited amendment have been allowed to remain unaltered. This part of the Reform Act is precisely that wherein a few of the alterations to which we alluded in the early part of this article might safely have been introduced, and under a judicious hand it would not have been difficult to simplify and perfect the present system of registration. Has this been done in the present instance? The first thing which strikes the eye upon reading over the clauses in this Bill relating to the registration of county voters, is the substitution of a sort of twofold document as the List of Voters for the present single sheet. Can any one see any conceivable advantage to be expected from this alteration? We confess we are entirely at a loss to understand the object of the alteration; the present mode required by the Reform Act for the overseers annually to make out a list of voters containing the names of all those who are on the Register for the time being, and also the names of all those who should claim to have their names inserted therein, appears to us to be so perfectly simple and intelligible, as to be in every respect unobjectionable, and we must say that we augur nothing but confusion as the result of the substitution of a system complicated and novel for one that was eminently simple and familiar to all parties.

But unnecessary as this alteration may be, and undeserving, as it undoubtedly is, of being termed an *amendment* upon any of the provisions of the Reform Act, the next

change which the sixth clause in this Bill presents to the reader's notice is perhaps still more uncalled for; we mean the substitution of the word "objected," in lieu of the words "objected to," as the mode of objecting by overseers. No necessity exists under the provisions of this Bill, as we shall presently show, for any such entry upon the margin of the list; but even were it necessary to make such an entry, we are far from comprehending the advantage to be derived from the substitution of one mode of notice for the other; on the contrary, we should have thought the safer course would have been to allow the latter words, with the effect of which all parties are now familiar, to remain, rather than run the risk of fresh difficulties by substituting a different form. The necessity of some such notice in the event of a person being objected to under the provisions of the Reform Act by the overseers, is obvious enough; it is the only notice which such a person receives of any objection having been made to him, and unless he substantiate his right to be upon the list of voters before the revising barrister, his name must be expunged upon mere proof of the placing of the words "objected to" opposite his name on the margin of the list previous to its being signed and published by the overseers; but this is not so under the present Bill, for it is proposed, as we have seen, by the ninth clause, to furnish all persons objected to by overseers with a similar written notice of objection as those who are objected to by third parties; and more than this, by the tenth clause, their names are to be included in the published list of objected voters: where then exists the necessity of adding the word "objected," or any other form of words indicating an objection having been made by overseers in the margin of the list before the name of the voter? We see neither necessity nor advantage, but we see that which probably escaped the drawer of this Bill, viz. that the effect of it will be to require of parish officers, who object to a voter, (and their objections are generally the most *bonâ fide* ones) a more complicated mode of objection than is required of other parties. Now, just to show how this is likely to work, we will take a case contemplated by the Bill itself, and which is likely to be of frequent occurrence. Suppose an individual to have his name inserted upon the register and to

reside out of the parish, and that the tenant whose name appears as the occupier of the qualifying property resides in the parish ; observe the complicated duties which this Bill imposes upon an overseer who has reasonable cause to believe that this individual has no right to remain on the register, and wishes to relieve his list from the name ; he must first write the word "objected" before his name in the margin of the list, he must then serve the individual with a notice of objection, and also his occupying tenant with a duplicate¹ of such notice, and finally he must include his name among the objected voters published upon the church doors. Contrast this complicated method with the plain and simple one now in universal and most salutary operation under the provisions of the Reform Act. These overseers' objections are practically of great use in weeding the lists of names which in times of rest from political excitement would otherwise, from the disinclination of third parties to interfere, encumber the lists to an extent of which non-professional men can have no idea ; they are seldom, if ever, made from party purposes, and the mode of making them is now perfectly understood by, and familiar to, all parties ; it is to be feared that this new plan will, if introduced, not only not facilitate, but will probably deter overseers from interfering at all in a matter which the Reform Act very properly, as we think, has left entirely to their discretion.

We must not, however, forget, while finding fault with this part of the Bill, to notice an attempt at improvement which would have been better if the mode of effectuating it had been pointed out ; we allude to the form of the notice of objection to be served on overseers. All persons are aware that by the Reform Act a notice of objection against a county voter must be served not only on himself, or his tenant, but also on the overseers of the parish, who are to publish a list of persons objected to ; now a difficulty has frequently arisen

¹ It is called a *duplicate* in the body of the Bill, but in the schedule, where the form is set out, parties are directed in a notice to a tenant to insert, instead of the words "your name," "the name of the person objected to." There is, however, no directions as to the party to whom a notice to a tenant is to be addressed, and if this remain unaltered, it will puzzle a far more learned man than an overseer, to know to whom the notice to the tenant is to be addressed.

where more than one person on the list bore the same name, **and** no means of identifying which was the person he intended to object to were adopted by the objector ; the consequence was, that the overseers published the name of the wrong person. This is attempted to be remedied in the bill before us, and in the form of notice to overseers (No. 6, schedule A.) the following nota bene is inserted : “ *Where two or more voters of the same name appear on the list of voters, the notice should distinguish the person intended to be objected to.*” Now this is all very well as far as it goes, but the great difficulty frequently is, *how* to distinguish two or more persons of the same name ; it may happen, and indeed frequently does so happen in populous parishes, that several persons of the same name, with descriptions and qualifications apparently identical, are on the same list. It would be difficult for an objector, residing perhaps at a distance, to comply with this part of the Bill, and with no other means of identity save those which the list itself afforded him, to distinguish these individuals one from the other. We should have thought that it would have been as well, if, in addition to this direction to distinguish parties of the same name, some mode of so doing had been pointed out, more especially as a very simple and a very obvious mode presents itself ; we allude to the one which would be obtained by requiring the overseers to make out their lists of voters *numerically*, in a similar manner to that in which the clerk of the peace is directed by the 54th section of the Reform Act to enter the names on the revised lists in the register book. Were such a provision as this introduced, no difficulty in distinguishing parties of the same name could by possibility arise, for although of the same name and of the same description in every particular, each individual voter would have a different number against his name ; so that, supposing a voter of the name of John Smith to stand No. 37 upon the list, the notice of objection to the overseers with reference to John Smith would run thus—“ I object to the name of John Smith (No. 37) being retained on the list ;” an amendment of this kind we should call an alteration for the better, and although in a comparatively unimportant particular, since it is a matter of no consequence under the Reform Act, provided the party objected to be served with a notice of objection,

whether the overseer publish a right list of objected voters or not, still we should be inclined to adopt it as tending to put a termination to disputes, however trifling, and to facilitate the order and regularity of proceedings.

But alterations, whether for better or for worse, are the order of the day, and we find an equally unnecessary alteration with that of the overseer's objections in the mode of serving a notice of objection upon an objected voter. Our readers are aware that by the 39th section of the Reform Act, any person objecting to another upon a county list is to give to the person objected to a notice in writing, or leave it at his place of abode as described in such list, or personally deliver it to his tenant in occupation of the premises described in such list; the two latter modes being for the purpose of facilitating the service of the notice, while the former "give to the person objected to" comprises every sort of delivery which would raise a reasonable presumption that the notice came to the hands of the party for whom it was intended.¹ Now in the present Bill it is proposed (excepting the service by post, upon which a word presently) to limit the mode of serving a notice of objection to two modes, viz. delivery to the party himself, or leaving it at his place of abode as described in the register or list.² The words in the 9th clause are, "*shall give or cause to be given to the person so objected to a notice in writing, by delivering the same or causing the same to be delivered to him, or by leaving the same or causing the same to be left at his place of abode,*" strictly therefore tying the objector down to the two modes of service mentioned; so that if a voter were to move from one side of the street to the other, it would be informal and insufficient service to leave a notice of objection at the house where he was actually living, but perfectly regular to leave one where some other party or perhaps no one at all was residing. But it may be said that this apparent absurdity is cured by the proviso that notices of objection may be sent by post; not so

¹ Vide *Smith v. Windle*, Barnes, 292; *Rhodes v. Innes*, 7 Bing. 329; *Williams v. Piggott*, 1 Tyr. & Gr. 933; *Widger v. Browning*, 1 M. & M. 27.

² Our readers may see an instructive instance of justice defeated by an act of parliament tying a party down to a particular mode of serving a notice in *Vaux v. Vollans*, 4 B. & Adol. 525.

in all cases, for in many parts of the country a man may have to go several miles to get to a post town, and besides we should like any one to point out to us how, under the provision as to sending by post, the notice of objection is to be addressed to the party objected to. The clause says, "*directed to the person to whom the same shall be sent at his place of abode as aforesaid.*" Now there are two places of abode aforesaid; one the place of abode on the register or list of the voter himself, and the other the usual place of abode of the occupying tenant. If by place of abode as aforesaid is meant the last mentioned, viz. the usual place of abode, it would have been as well to have so stated it plainly and unambiguously; if on the contrary the rule *reddendo singula singulis* is to be adopted, and the objected voter is to have his notice sent by post to the place of abode stated on the register, what chance have those who have changed their places of abode of receiving their notice of objection? We must say of this part of the Bill, that it is no improvement whatever upon the provisions of the Reform Act, and that although professing to benefit both the objector and the objected, it will be found in practice to hamper and cramp the one, while it affords no adequate protection to the other.

The alterations proposed to be introduced into the system of registration for Cities and Boroughs are of a different character from those above noticed; they are, to our minds, for the most part unimportant, but nevertheless are free from any serious objection. It is proposed to throw the duty of framing the lists upon the town clerk of each city and borough, who is to furnish the overseers with copies of notices and lists as guides to them in their duties. The overseers are to publish a notice on the 20th of June in every year, warning all persons to pay up their rates due on the 6th of April preceding before the 20th of July, and are to prepare their lists in the same form as now, with the exception that a column is added for the insertion of the place of abode of the voters; power of claiming is reserved as now to all persons omitted from the lists, and a power of objecting to any name on the list is given to parties whose names are on the list, upon their giving notice of objection to the overseer and also to the party objected to. This we like, and it is curious

enough, but the mode in which this notice is to be served (see section 20) is free from the objections we have noticed in that which is to be served on county voters. Lists of claimants and objections are to be published, and a copy of all the lists is to be given to the town clerk ; the reason of this we do not understand. The town clerk's duties appear very much the same as they are at present, as respects the making out of the list of freemen ; and there is then a provision that no list is to be invalidated for imperfect publication, and if no list is made out the register of voters for the time being is to be deemed the list of voters for the year ensuing and to be dealt with as such.

We now come to that part of the Bill which relates to the Revising Barristers ; the power of appointing them is left where it now is, viz. in the hands of the Chief Justice of the Queen's Bench, and those of the senior judge in the commission of assize for each circuit respectively. No barrister is to be appointed who is not of five years' standing, nor are any greater number to be appointed (unless upon death, illness, or other sufficient causes particularly specified) than the following, viz. for the county of Middlesex, the city of London, the city of Westminster, and the boroughs in the county of Middlesex, *Three* ; for the counties, cities, boroughs, and places within the Home Circuit, *Nine* ; for those within the Western Circuit, *Thirteen* ; for those within the Oxford Circuit, *Twelve* ; for those within the Midland Circuit, *Twelve* ; for those within the Norfolk Circuit, *Eight* ; for those within the Northern Circuit, *Fourteen* ; for those within the North Wales Circuit, *Seven*, and for those within the South Wales Circuit, *Six*. Every such barrister is to notify his appointment to the clerk of the peace for the county for which he may be appointed, and to the town clerk of each city and borough, and to give notice to the clerk of the peace and town clerk respectively seven days before the holding of the first court of revision, of the several times and places at which the courts will be holden, and the duty of advertising the same is, very properly as we think, taken from the barrister and imposed upon the clerk of the peace and the town clerks. The clerk of the peace is as now to deliver in the lists at the first county court of revision, and the overseers are to attend

the courts which may be holden for revising the lists relating to their respective parishes, and also the high constable those which may be holden for the parishes within his constablewick.

This latter provision is new, and, as we think, needlessly burthensome upon the high constable, there being no information that we are aware of which requires his presence or which could afford the barrister any assistance in revising the lists. The town clerk and overseers of parishes within cities and boroughs are to attend the court as heretofore, with a very proper provision reserved to the barrister of requiring the presence of the overseers of the past year to assist him in revising the lists; a power is given to the barrister to fine high constables and overseers for neglect of duty to the extent of 5*l.* and not less than 20*s.*, and he is also empowered to give costs to the extent of 20*s.* (if such amount of costs shall have actually been incurred) to all persons against whom frivolous objections may have been made, and also to all persons objecting, where the opposition to such objection has been without reasonable and probable cause, with a proviso that no further notice of objection by the same objector should be gone into until the costs ordered to be paid by him shall have been paid to the person entitled to receive them, or deposited in the hands of the barrister. All this we like, and, with the exception of the small amount within which the barrister is limited to award costs, we consider these provisions well calculated to check the wanton exercise of the power of objecting, as well as the frivolous opposition to bonâ fide objections, which at present so needlessly impede the business in the revising courts. The expenses of the overseers (but not of the poor high constable) with a reasonable remuneration to them for their loss of time and labour, and also the expenses of the returning officer, town clerk, and secondaries of every city or borough, are to be defrayed out of the poor rate for each parish, &c.; the account however of overseers' expenses to be laid before the barrister and allowed by him.

The Barristers originally appointed are to be remunerated, not, as heretofore, at the rate of so much per diem for every day they shall be employed, over and above their travelling and other expenses, but by a fixed sum, viz. "*the sum of two hundred guineas by way of remuneration to him and*

in satisfaction of his travelling and other expenses ;” while those who may be added to the original list under the special clause, reserving such a power to the judges in particular cases (such as death, incapacity, or want of sufficient numbers), are to be paid at the rate of five guineas per diem, together with three guineas each day for their travelling and other expenses.

Our readers will, we think, be inclined to agree with us in thinking that these provisions, as respects the number of barristers to be originally appointed and the proposed mode of remunerating them, are at once novel and anomalous. At the same time we feel a delicacy, which may be easily understood, in discussing this part of the Bill with the same openness and freedom which we have taken the liberty of evincing towards other portions of it. It is not difficult to understand the object which the framer of these provisions had in view in thus limiting the number of Revising Barristers ; we fully agree with him in opinion, that the number now appointed is disproportionately large for the work to be performed, and, although the amount of fees which the Treasury is thereby called upon to pay is not materially increased, still the travelling expenses alone of those who may not inaptly be termed supernumeraries amount yearly to a considerable sum. We have no data before us on which to form a judgment, how far the number now fixed upon will prove sufficient to enable them, *communibus annis*, efficiently to perform their duties ; and, although we must assume that an accurate calculation has been gone into with reference thereto, there does appear to us to be an extreme disproportion in the number fixed for Wales (thirteen) when compared with that limited to the Northern Circuit (fourteen), or to the Western Circuit (thirteen). The proposed mode of remuneration must strike every one to be peculiarly unreasonable and unjust, both towards the individual and the country. What proportion can possibly exist between the labour and expenses attendant upon the revision of Cornwall, Devonshire, or the West Riding of Yorkshire, with Hampshire or Rutland ? and yet all are to be placed in the same footing of remuneration ; whether employed twenty days or forty, whether the duty includes a hundred miles of travelling by rail-road or a thousand of posting, yet each barrister is to receive the same sum by way

of remunerating him for his trouble and expenses.¹ This will never do ; it is a new sort of bed of Procrustes, upon which few will like to be stretched, and which we fear will, if persisted in, be likely to deprive the public of the services of those most familiar with the duties of revision and most capable of presiding in those courts.

The Court of Appeal which this Bill proposes to create from the decision of the revising barristers, although not exactly the sort of thing which we ourselves should have recommended, is, as far as it goes, unobjectionable. Three barristers are to be appointed judges of the court, at a salary per diem not yet fixed, to hold their office during good behaviour, to be jointly appointed by the chiefs of the three Common Law Courts in Westminster Hall ; an appeal to this court is given to any person claiming to be entitled, or objecting to the right of any other person to be registered, as a voter, and who shall be dissatisfied with any decision of a revising barrister on any point of law affecting such claim or objection, or to any person on behalf of such claimant or objector. The barrister to state in writing the facts proved before him material to the claim or objection and his decision thereon, at the foot of which statement the appellant is to write " I appeal from this decision." The appellant's name and place of abode to be indorsed upon the appeal paper by the barrister, the said paper to be delivered at the close of his circuit to the judges of the appeal court. All decisions of the court of appeal, reversing or in any way altering the decision of the revising barrister, to be forthwith notified to the sheriff of the county, or the returning officer of the city or borough, as the case may be, who are forthwith to alter the register in such manner as the majority of the judges of the court of appeal shall direct ; no appeal pending is to affect the right of voting, nor is any decision after election to affect the result of such election. Counsel are to be allowed to practise in the appeal court, which is to have the power of making rules for the transaction of business and of giving costs to parties to the appeal if they should think fit.

The disputed questions of election law which this Bill pro-

* ¹ Is it seriously intended that the expenses incurred by the Barrister (very serious, in some places) in the hire of courts, fees to court-keepers, &c., are to be paid out of his fee of two hundred guineas? And yet there appears to be no other provision for defraying these expenses.

poses to set at rest by declaratory enactments are, four points which arise in reference to county voters, and two points in reference to borough voters.

The points upon which it states differences of opinion to have arisen, and doubts to be entertained, in respect of county voters, are, 1st, the necessity of registering annuities or rent-charges under 3 Geo. III. c. 24, this it disposes of by repealing that statute altogether; 2ndly, whether or not a successive occupation of lands and tenements at a rent of 50*l.* a-year is sufficient to give a vote for the county, this it declares in the affirmative; 3rdly, whether joint occupiers in counties of lands and tenements at a rent which when divided by the number of occupiers will give a rent of 50*l.* a-year for each occupier, are entitled to be registered and to vote, this also it declares in the affirmative; and 4thly, a provision relating to trustees and mortgagees, which, as it is lengthy and our limits are short, we shall decline to insert, but of which we can only say that it appears to leave the question very much in the same state as it now is.

The two questions in the borough franchise, which it considers sufficiently moot to require a declaratory enactment, are insufficient or informal rating, and the mode of measuring the seven miles within which a party is required to be resident to exercise the franchise. Upon the first point it is proposed to provide that an inaccurate description of a person on the rate is not to prevent his being registered, provided the party shall have been *liable* to be rated in respect of the premises for which he seeks to be put upon the list, and shall have paid, on or before the 20th July, all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to 6th April. The seven miles are to be measured in a *straight* line, such distance to be determined by the ordnance map if any there be sufficiently extensive for the purpose. The above provision, with respect to an informality in the rate, we consider to be essentially a good and equitable one; it was a question with which the proposed court of appeal could scarcely have dealt to the extent proposed by this enactment; but as respects the remaining points or questions settled by this Bill, we are not sure whether it would not have been better and more constitutional to have left them to be dealt with and decided by the court of appeal.

The questions proposed by this Bill to be put to the voter at the poll are simply an inquiry as to his being the same person whose name appears upon the register, whether he has before voted, and, in cities and boroughs, whether he has resided since his name was inserted in the register, and still does reside, in the borough or within seven miles thereof. Our readers are aware that under the Reform Act, in addition to the questions as to identity and previous voting, there is a question put as to the party possessing "the same qualification" for which his name was originally inserted in the register; and the Election Reports abound with decisions as to what is and what is not the same qualification, decisions not very satisfactory in themselves and frequently contradictory of each other: there is a provision in this Bill that, provided a borough voter be resident at the time of tendering his vote within the borough, or seven miles thereof, the register shall in all other respects be conclusive evidence of the voter's retaining the same qualification as that for which his name was originally inserted.

The safe custody of the poll books is proposed to be insured by a clause requiring the returning officer at every contested election, after declaring the state of the poll, to seal up the poll books and tender the same to each candidate, to be by him also sealed, after which the returning officer is to transmit them to the clerk of the crown in chancery, who is to produce them before any election committee of the House of Commons upon receipt of a warrant under the hand of the chairman.

The disputed question as to the power of election committees to open the register is finally put an end to by a clause in the Bill, which provides, that the register of voters in force at the time of an election shall be final and conclusive to all intents and purposes as to the right to vote in such election of every person who shall be upon such register, unless the name of any voter, or any person tendering his vote, shall have been specially retained upon such register or inserted therein, or omitted or expunged therefrom, by the express decision of the revising barrister, or by the decision of the court of appeal, or unless the right to vote of any person be disputed on the ground of legal incapacity at the time of his voting.

We have now presented our readers with a short, but, as

far as regards the principal features of it, a correct analysis of the Bill now on the tables of members of both Houses, and in circulation among the public, for consideration and discussion, previous to the reassembling of parliament, when, we are assured, it will be presented at an early period of the session. Now we seriously ask, is this the sort of Bill which they expected would have been introduced to the notice of the legislature? Does this at all come up to the improvements which might have been introduced or the defects which might have been remedied in the system of registration as provided for by the Reform Act? Where is that comprehensiveness of design and felicity of execution which might have been expected in a measure of such importance as the present is represented to be? Are the real substantial difficulties which present themselves in the Reform Act grappled with, or are minor and unimportant ones substituted in their place? We fear that the answers to all these questions are but too obvious.

The formation of a register of parliamentary electors was a new and an untried experiment introduced by the Reform Act; the only plan at all resembling it which had before existed being a sort of clumsy approximation to a register in requiring county electors to be assessed to the land tax; the experiment has been found generally to succeed, but, as might have been expected from the novelty of the thing, certain defects have been discovered to exist in the machinery for the formation of the register, or, which may be nearer the truth, experience has suggested certain improvements which may safely be introduced into the system. The public, we believe, are content to receive either the one reason or the other for the introduction of a bill for the amendment of the Reform Act, but then they have at least a right to expect that the new law shall be itself final and conclusive, and that as it professes to clear up doubts and solve difficulties it should be itself free from those defects. No one, we are persuaded, who is at all familiar with the subject, practically we mean,—not one who derives his knowledge from the study of Digests of Election Law, or even of the act of parliament itself,—can rise from the perusal of this Bill without foreseeing that in so expecting it he will be sadly disappointed. So far from being final and

conclusive we are satisfied that, if allowed to pass into law, not one revision will go by without an universal demand for a reconsideration of the question and a fresh amendment of the law; and as for that freedom from doubt or difficulty of construction which such a measure, professing to amend another for those very defects, should eminently possess, we fear that we have already noticed too many instances to leave any hope that litigation will be diminished or certainty secured by the passing of this Bill.

We are unwilling to conclude this notice without some more pointed allusion to those improvements which we glanced at in the earlier part of this article, and which we stated might with advantage be introduced into a measure of this kind. Our readers are aware that the whole initiation (if we may so call it) of forming the county register is cast upon the overseers by the Reform Act, and that the only alteration proposed by the Bill before us is that of requiring the clerk of the peace to furnish them with copies of the register and copies of the different lists and notices which they will have to prepare; now this we consider to be an attempt to improve a part of the system of registration which nothing short of a complete alteration can affect; the original vice consists not in the duties which are thrown upon the parties who are to make out the lists, but in the *selection* of those parties for the performance of them; the duties themselves are light and easy of performance, but then that is with reference to those who are to perform them: now it must be admitted, that a more unfortunate choice never was made than when the framers of the Reform Act pitched upon the country overseers as the parties who were to originate and make out the lists of county voters; they are at the best not a very bright set; wholly unfamiliar both from education and habit with legal forms of any description, if by chance a brighter man than ordinary is overseer of his parish, and makes himself familiar with the numerous and increasing¹ duties which the law is constantly throwing upon him, no sooner is he *au fait* at his work, than Lady-day comes round, all his experience is lost to the parish and the public, and a fresh overseer is appointed,

¹ By an act passed in the last session, overseers are now to make out annually a list of persons liable to serve the office of constable.

to whom the duties are as new as they are burthensome and incomprehensible. What chance is there, then, of any alteration for the better being effected while this part of the system is persisted in? And why is not advantage taken of a Bill to amend the system of registration being brought into parliament to introduce a clause which shall entrust the performance of these duties to parties whose professional education and position in the several counties eminently qualify them for their due execution? Why retain the overseers at all as agents in the formation of the county lists? There is no magic in the word, or the office of, overseer, and save and except the local knowledge of property and its possessors within their respective parishes which they may be supposed to possess, and which by the bye this Bill will effectually neutralize by hampering them in their objections, we see no reason why any other official person should not prepare and post the lists as well as an overseer.

The clerk of the peace has been suggested by some as the proper person to perform this duty; and certainly the possession of the register would afford him peculiar facilities for so doing, but we scarcely think that this advantage would counterbalance the difficulty which he would have in publishing the lists and notices in the several parishes, a duty which undoubtedly some person on the spot or in the neighbourhood ought to perform, or at least to superintend. There exist, however, two other officers, to either of whom we think the duty now cast upon the overseers might safely and with advantage be transferred; but then we would have these officers reasonably but properly remunerated for their trouble, an expense which would be abundantly repaid to the public in the accuracy and expedition which would thereby be insured. We would impose this duty upon either the clerk to the magistrates for all parishes and places within his magisterial division, or else upon the clerk to the union for all parishes and places forming part of the union. It is immaterial upon which of these two officers the duty is cast; both offices are invariably filled by professional men perfectly accustomed to business, and whose present duties would make them sufficiently familiar with the parishes within their districts to fulfil the new ones imposed upon them, with at least as much accuracy and facility as the

present overseers. We ourselves consider this to be one of the most essential amendments required in this part of the Reform Act; we are quite certain that discontent and doubt and difficulty will continually recur so long as the provisions of an act of parliament so liable to be closely scanned and so frequently brought into question as this is, are entrusted to parties to carry out wholly unfamiliar with matters of this description; and we do hope, that if it be seriously intended to amend the system of registration of voters, the opportunity may not be suffered to pass by of entrusting so important a part of it, as confessedly is that of making the lists, to persons competent by habits and education to perform their duty.

It will not fail to be perceived that this Bill passes by unnoticed the oft vexata quæstio of the "other building," which together with land gives a borough franchise under the Reform Act. We should certainly have thought that one of the first objects, the very first clause indeed which the framer of a measure of this description would have sketched out, would have been one to set this matter finally at rest. It is a question observe which no court of appeal can satisfactorily deal with, and is therefore one of the very few points connected with the qualification of electors under the Reform Act which we should suggest ought to be made the subject of parliamentary interpretation; but no, *Diis aliter visum*, and the Bill before us, while it carefully and scrupulously puts a legislative exposition upon certain clauses in the Reform Act which one decision of the court of appeal would have satisfactorily and for ever decided, and upon which very small difference of opinion, if any, existed among the revising barristers, and we will undertake to say, with respect to the construction of which clauses not twenty questions arise in the year, it carefully, we say, legislates for these matters—such, for example, as that fifty-pound occupiers in counties may be joint occupiers, and may vote for premises occupied in succession, and how the seven miles within which a voter must reside to give him a vote for a borough are to be measured—and yet passes by, without a word, a question not only of such general concern that there is not a contested city or borough where it does not arise before the revising barristers time after time, but upon which, from the very nature of the term made use of in the

act of parliament, "other building," it is in vain to expect uniformity of decision, and which, if left to the judgment of the court of appeal, it will, we think, be equally vain to expect a decision which shall be satisfactory. Such a point as this then we say ought to have found a place in a Bill to amend the law which regulates the registration and qualification of parliamentary electors, and no Bill, we confidently anticipate, with such a title, is such as the public will be inclined to accept, unless provision be made for defining what building it is which together with land is to give the franchise in cities and boroughs.

Many definitions have been suggested as a mode of confining the word building to some certain meaning, as, for instance, the plan which is to be found in one of the bills introduced by the late government, viz. that of confining it to all buildings of the value of 5*l.* per annum ; this however, by confining the value, would exclude many buildings clearly intended by the Reform Act to give the franchise, and would still leave the question untouched, viz. the *class* of buildings which the act intended to embrace. It has been strongly urged by some that only those buildings which are of the same general nature (*ejusdem generis*, as it is technically termed) with the tenements mentioned immediately before the words "other building," give the right of voting, and that all other buildings are without the scope of the statute ; this however is considered by some, and we think rightly, too narrow a view, for it would exclude many buildings of a most substantial character, which it would be difficult to conceive were not at least within the spirit if not within the words of the statute. We have but to mention stables, coach-houses, conservatories, baths, reading rooms, and many others which might be enumerated, none of which are *ejusdem generis* with either house, warehouse, counting-house, or shop, to show the havoc which such a view of the meaning of the words would make amongst the constituency of many boroughs, with which our readers must be acquainted ; and yet this is supposed to be the most logical and lawyer-like view of the subject. Others again go to the further extreme, and are inclined to admit to a participation in the borough franchise those who occupy any erection of any kind, however humble, from a pigstye to a lean-to (anglicè, *linhay*), which by the broadest

licence of language can be called a building. These are the two extremes, but there exist various shades of opinion between them, some deeming brick and mortar to be the test, while others consider a roof to be the *sine quâ non*. The consequences of all this are obvious and most distressing, uncertainty of the worst kind, viz. that which subjects the voter to be harassed with objections year after year, which, even with a power of giving costs, can scarcely be deemed not *bonâ fide*.

Under these circumstances, we repeat that in a measure of this nature, some attempt should have been made to set this matter finally at rest. There appears to us to exist a mode of doing this so simple, and at the same time so consistent with the provisions of the Act in which the words are to be found, that we wonder at its never having suggested itself to the minds of those who have had the preparing of these measures. The Reform Act recognises two sorts of constituencies in cities and boroughs, viz. the urban constituency, and the suburban or rural constituency; this is shown by the large rural districts which have been thrown, under the provisions of the Boundary Act, into many of the old boroughs. It is somewhat curious though, that with the exception of the word "house," and the doubtful term "other building," there is no subject matter of occupation mentioned in the 27th clause of the Reform Act which is applicable to the habits of life of a rural constituency. Shop,—warehouse,—counting-house,—all these are terms familiar to and used with reference to the employments and occupations of those who dwell in towns; no term save that of "house," and perhaps "other building," is applicable alike to the occupations of the dwellers in cities and the dwellers in the country. It is to this omission we think, and not to any mischievous freak of a learned lord to whom it was attributed at the time, that we are indebted for the introduction of the term "other building." The franchise, as the Reform Bill stood when it came up to the House of Lords, was granted to the occupiers in boroughs of "*houses, warehouses, shops, or counting-houses*. Had this been permitted to continue, an unfair preponderance would have been secured to the urban population, for they would thus possess *four* subject matters of occupation, while the rural population would in fact possess but *one*, viz. the house; the words "other building" were

consequently introduced to restore the balance, not at all, as some would suppose, to confine the franchise to buildings ejusdem generis with those previously mentioned, for that would have been no boon to the rural population, but on the contrary, to extend the subject matter of occupation in their favour, and thus put them upon the same footing with their urban brethren. This we take to be the history of the introduction of these words "other building" into the Reform Act, and to be the key to the meaning which is to be attached to them, viz. such buildings as are devoted to the purposes of trade or of agriculture; we cannot but think that a short clause confining the franchise to the occupation of buildings devoted to one or other of these purposes, with an instance or two inserted in the schedules to show the sort of buildings intended, would carry out the spirit and intention of the Reform Act, and at once dry up the most fruitful source of litigation and bad blood which these constant disputes engender in all boroughs at all subject to the pest of contested elections.

With these observations we take leave of the Bill before us. In undertaking to review its provisions we have had to perform an irksome and painful task—self-imposed, it is true, but not the less irksome and painful on that account—that of finding fault with the provisions of a Bill introduced by our political friends. All our political sympathies are on the side of those who have presented this Bill to the attention of the country; and although not of the number of those who clamoured for a registration amendment Bill as a *sine qua non*, we still anticipated the appearance of a measure of a wholly different character from the present, and were prepared almost silently, such confidence had we and have we still in those who now direct the affairs of the country, to acquiesce in any alterations they might think necessary to introduce; but we have been disappointed, and we owed it alike to the public and to ourselves freely and openly to discuss, without regard to the quarter from which it emanated, the provisions of a Bill which we conscientiously believe to be fraught with evil consequences to the nation.

S.

ART. III.—RIGHTS IN THE SEA AND NAVIGABLE RIVERS.

THE narrow seas adjoining to the coast of England, and all arms of the sea, are originally part of the waste and demesnes and dominions of the crown of England. By arms of the sea must be understood all rivers which flow and reflow, but only so far as they flow.¹ The property of the crown extends to the high water mark of an ordinary tide, and of course includes the ownership of the soil. We do not say ordinary *spring* tide; Hale says, the title of the sovereign does *not* extend to the mark of a high spring tide, or of an extraordinary tide, but only to land “usually overflowed at ordinary tides;” and seems to have thought, that the crown could only claim land covered by the ordinary tides.² In an act passed 1 Vict. sess. 1837, for forming a harbour in the parish of Warkworth, in the county of Northumberland, in order to secure the rights of the admiralty, it was enacted, that nothing in the act contained should extend to authorize the making or erecting any work, “below the ordinary high water mark at spring tides,” without the assent of the admiralty.

But although the sovereign is the owner of this great waste, yet the common people of England have regularly a common of fishery³ in, and a right of passage and navigation over, the sea and its creeks and arms. But the flowing of the sea into a river or creek does not necessarily make it public; the use of it by the public must be shown.⁴ This public right of

¹ 16 Vin. Ab. 574, B. a. pl. 5.

² *De Jure Maris*, chap. vi. See *Lowe v. Govett*, 3 Barn. & Adol. 863; *Webber v. Richards*, 10 Law Journ. 203.

³ This appears by, *inter alia*, the ancient rule of the common law, that the sovereign shall have the sole right to sturgeons and whales, *Plowd.* 315 a. It is said in an article in No. XXII. of the *Dublin Review*, “on principles of public policy, courtesy and convenience, every nation is allowed the exclusive dominion of so much of the sea surrounding its coasts as is within cannon-shot of the shore, and of those parts of it which are land-locked, as roads, bays, gulphs, &c. But in these parts all the members of that nation have the same right to fish that all nations have in the parts which are not so appropriated.” In a speech made by Sir Robert Peel, in Parliament (see *Times Newspaper*, Feb. 19, 1842), he said, “The right to fish in the sea, on the part of this country, speaking generally, lay within three miles of the coast; but the question was, as to the entrance of French boats within the three miles, not for the purpose of fishing, but of lying to, so as to be ready to fish in the morning.”

⁴ *Rex v. Montague*, 4 Barn. & Cr. 598, 601.

fishing was, however, originally subject to the right of property in the crown. The sovereign might, for his own pleasure or profit, exclude the public from fishing in any river or district, and so might grant to an individual the exclusive right of fishing in any river or place, and that in fee simple and perpetuity. And so the shore of the sea or bed of a river might, and still may, be granted to a subject; and Hale says, "such shore may be, and commonly is, parcel of the manor adjacent, and so may belong to a subject." And undoubtedly even at the present day, the crown or other owner of the sea shore, or bed of a river, may exclude the public, if neither of the public rights above-mentioned be thereby injured.

These general observations, it will be observed, open out questions of great extent and interest, and it is our intention to devote a few pages to the discussion of some of them.

I. As to public and private rights of fishing in the sea and its creeks and arms.

That the crown had originally the power to defeat and restrict the public right of fishing, is proved by the private rights which now exist, and which have ever been recognized as valid. In the stat. 2 Hen. VI. c. 15, A.D. 1423, which prohibits the standing of nets over thwart rivers, there is a saving to the king's liege people of "their right, title, and inheritance in their fishings." Blackstone assumes that the crown had this power, but thinks that the exercise of it was prohibited by the charter of King John, and the subsequent charter of Henry III., by which even all grants of private fisheries made under Richard I. were annulled; so that, he concludes, an exclusive right of fishing in a public river ought now to be at least as old as the reign of Hen. II.¹

The chapter in the charter of John, referred to by Blackstone, is as follows, "*Omnes forestæ quæ aforestatæ sunt tempore nostro statim disafforestentur et ita fiat de ripariis quæ per nos tempore nostro posita sunt in defenso.*"² The corresponding chapter (c. 16) in the charter of Henry III. is, "*Nullæ ripariæ defendantur de cætero, nisi illæ quæ fuerunt in defenso tempore Henrici regis avi nostri, et per eadem loca et eosdem terminos sicut esse consueverunt tempore suo.*" Lord

¹ 2 Blk. Com. 39.

² C. 47.

Hale explains the origin of these enactments, and shows that they were made to restrain an undoubted prerogative in the crown. He says,¹ "Before the statute of Magna Charta, cap. 16, it was frequent for the king to put as well fresh as salt rivers *in defenso* for his recreation; that is, to bar fishing or fowling in a river, till the king had taken his pleasure or advantage of the writ or precept *De defensione ripariæ*, which anciently was directed to the sheriff, to prohibit rivation in any rivers in his bailiwick."² After the statute the writs were still used, and ran "ut nullus de cætero eat ad rivandum in ripariis nostris in ballivâ tuâ quæ in defenso fuerunt tempore Henrici regis avi nostri." This undoubtedly shows very clearly the power which the sovereign had in and over rivers, and it certainly was a right which he could transfer to a subject, and Lord Coke considers Magna Charta, c. 16, as a general enactment against all persons who would keep rivers several.³

But cap. 16 is not the only clause of Magna Charta which protects the public right of fishing; cap. 23 enacts, "Omnes kidelli deponantur de cætero penitus per Thamisiâ et Medwayam et per totam Angliam, nisi per costeram maris." In a case 7 Jac.⁴ it was resolved that this extends only to kidels, i. e. open weirs for taking of fish, and not to more substantial weirs or causeys. But private rights in rivers, and consequently rights of fishing, were further restricted by several subsequent acts, which prohibited all weirs, mills, millstanks, stakes, and kidels; and the raising or enlarging of any built since 1 Ed. I.⁵

By the stat. 2 Hen. VI., c. 15, before referred to, all standing or fixed nets overthwart rivers are prohibited, with the saving of existing rights.

By 3 Jac. I., c. 12, weirs along the sea coast, or within five

¹ De Jure Maris, chap. ii.

² It appears from a case 7 Hen. 3, that the king or any other by his command, might break a stew (vivarium), which is another's freehold, and take the fish for his provision by force of his prerogative, Plowd. 323.

³ 2 Inst. 30.

⁴ 10 Rep. 137.

⁵ See 25 Edw. 3, c. 4; 1 Hen. 4, c. 12; 12 Edw. 4, c. 7. See these acts referred to in the case of Chester Mill, upon the river Dee, 10 Rep. 137; Williams v. Wilcox, 8 Adol. & Ell. 314.

miles of any haven, are prohibited in favour of the breed of fish.¹

Now in strictness the enactments cited above extend only to prevent the inclosing of navigable rivers and the destruction of the fry and breed of fish, but in practice and in favour of the public right they have been carried further, and they have accordingly been held to prevent the crown from granting any right of fishery, though the same should not require the erection of any wear, or permanent or stationary net, for it is clearly the common understanding that a private and several right to fish in a navigable river must have its origin before the enactments of Magna Charta.² Lord Mansfield thus clearly states the law with respect to exclusive rights of fishing in navigable rivers.³ In rivers not navigable the proprietors of the land have the right of fishery on their respective sides, and it generally extends *ad filum medium aquæ*.

But in navigable rivers the proprietors of the land on each side have it not. The fishery is common. It is *primâ facie* in the king, and is public.

If any one claim exclusively, he must show a right: if he can show a right by prescription, he may then exercise an exclusive right; though the prescription is against him unless he can prove such a prescriptive right.

Here it is claimed and found: it is therefore consistent with all the cases, "that he may have an exclusive privilege of fishing, although it be an arm of the sea." Such a right shall not be presumed, but the contrary, *primâ facie*. But it is capable of being proved, and must have been so in the present case.

Mr. Justice Yates in this case observed, "The cited cases prove only this distinction, 'that navigable rivers or arms of the sea belong to the crown, and not, like private rivers, to the landowners on each side,' and therefore the presumption lies the contrary way in the one case from what it does in the other. Here indeed it lies *primâ facie* on the side of the king

¹ See *Bridger v. Richardson*, 2 Mau. & Sel. 568, in which it was doubted whether shell-fish, as oysters, were within this statute; and see the *Mayor &c. of Maldon v. Woolvet*, 12 Adol. & Ell. 13, as to oyster spat or spawn, and for the statutes for the protection of spawn of fish.

² 5 Barn. & Cr. 884.

³ *Carter v. Marcot*, 4 Burr. 2162.

and the public, but it may nevertheless be appropriated by prescription."

In *Weld v. Hornby*¹ it was held that an ancient brushwood weir could not lawfully be converted into a stone weir or dam whereby the passage of the fish up the river was prevented; and Lord Ellenborough, C. J., observed, "I remember that the stells erected in the river Eden by the late Lord Lonsdale and the corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced in this court to be illegal and a public nuisance."²

It is abundantly shown by Lord Hale that private rights of fishing may exist even in the sea, and many such now exist.³ In a bill for an injunction filed in 1840 by the Duke of Northumberland v. John Forster, one of the commissioners of Warkworth harbour, it was stated that his Grace was seised of a sole, several, and exclusive fishery or right of fishing for salmon and fish of the salmon kind in the river Coquet, in the county of Northumberland, being an ancient salmon fishery called the Warkworth fishery, and also of a sole, several, and exclusive fishery or right of fishing *on the sea coast*, at the mouth of the said river Coquet, and near to the Warkworth fishery, called the Amble Stell Fishery.

These fisheries, it appears, belonged to the monastery of Tynemouth, and were granted by Edward VI. in the fourth year of his reign, to Messrs. Sadler and Winnington, in fee as "all that salmon fishery with its appurtenances in the county of Northumberland, within the waters of Coquet called Wellesnewke, and also all that our salmon fishery with the appurtenances in the sea adjoining to the said fishery, called Wellesnewke."

The Duke of Northumberland, though the sole owner of the fisheries above mentioned, is not the owner of the soil or ground between high and low water-mark, on which the same are exercised; the same, we believe, belongs to the Earl of Newburgh. This instance shows, that though the crown cannot now create a new exclusive right to fish, yet if such a right becomes vested in the crown, it may be regranted. J. W., by his will dated 6th August, 1783, devised, inter alia,

¹ 7 East, 195.

² See *Robson v. Robinson*, 3 Doug. 307.

³ See *Mayor of Orford v. Richardson*, 4 T. R. 437.

"all his stell or sea fishery extending along the coast for several miles in or near Hauxley, in the county of Northumberland."

We have now stated the substance of what is found in our books respecting the origin of private rights of fishing, and we confess we doubt whether it can be correctly said that by the common law the public have a general right of fishing in the sea and its branches; for such a right seems inconsistent with the existing private rights. We believe the true doctrine to be, and the point is still perhaps of some importance, that by the common law the sovereign is the sole and exclusive owner of the sea and all navigable rivers, and that originally the public had no right which could compete with the prerogative and franchise of the crown. Thus the crown could appropriate any river or fishery to itself, and entirely exclude the public;¹ and accordingly we find that the salmon fishery in the river Banne in Ulster was long part of the ancient inheritance of the crown. So grants could be made to private individuals: and we find it said that before the statute of 18 Edw. III. no subject could pass over the sea without the king's special licence; but there it is enacted, that the sea shall be open to all merchants.² Of course, generally speaking, the crown had no interest in excluding the public; and thus the public, in most places, by use and custom, acquired a right; and undoubtedly the royal prerogative of which we speak was restricted by the provisions of *Magna Charta* cited above; for that statute, by restraining the crown and its grantees from fencing (c. 16) and from inclosing and incumbering navigable rivers (c. 23), indirectly secured the privilege of fishing therein to the public. And certainly cap. 23 of *Magna Charta*, which we have cited above, and the numerous other ancient statutes³ which were passed to prevent obstructions in navigable rivers, seem to be evidence that the public had not therein any certain common law rights of passage

¹ 1 Harg. Law Tr. 7.

² See 2 Edw. 6, c. 6, and the case of the Royal Fishery of the Banne, *Davies*, 149, where there are many other authorities, all tending to the same point.

³ 25 Edw. 3, stat. 4, c. 4; 45 Edw. 3, c. 2; 1 Hen. 4, c. 12; and Statute of Sewers, 23 Hen. 8, c. 5; and 13 Rep. 36. But see *Williams v. Wilcox*, 8 Adol. & Ell. 314.

and fishing. These rights of the public originated, it may be said, in necessity, and are founded in and established by custom and use, and they have ever been the favourites of the legislature. Lord Hale says¹ that the right of fishing in the sea and navigable rivers is originally lodged in the king, but that the common people of England have regularly a liberty of fishing therein, "as a public common of fishery," which is of course derived from the sovereign, just as common of pasture is derived from the lord of the manor.

Lord Hale also says,² "Though the propriety of the soil of a creek or harbour may belong to a subject or private person, yet the king hath his *jus regium* in that creek or harbour; and there is also a common liberty for any one to come thither with boats and vessels as against all but the king. And upon this account, though A. may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to B., and so the interest of propriety and the interest of franchise may be several and divided. And in this no injury is at all done to A., for he hath what he had before, viz. the interest of the soil, and consequently the improvement of the shore and the liberty of fishing; and as the creek was free for any to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unlade."

It would seem from these passages that Lord Hale considered the rights of the public in the sea and its branches as derived from and even in some respects as still subservient to the crown, but in other places in the same tract, such the right of the public is, perhaps incautiously, treated almost as an independent and strict common law right,³ a doctrine irreconcilable with nearly every fact connected with the sea and navigable rivers. And in addition to the facts we have already stated, we would add that every river or creek into which the sea may flow is not public, so that a custom and use must be shown.⁴

Another proof, too, that the public right of fishing is not strictly a common law right, as a right to use a highway is,

¹ 1 Harg. Law Tr. 11.

² Ibid. 73.

³ And see *Williams v. Wilcocks*, 8 Adol. & Ell. 314.

⁴ See cases cited 4 Barn. & Cr. 602.

is that a private right of fishing, that is, a right to exclude the public, may be acquired by prescription or usage, as contradistinguished from a grant;¹ that is, the public right may be defeated by adverse possession and time, which a public right of way cannot be.² The prescriptive right destroys the general right.³ "A usage of forty years' duration is not only evidence for that period, but affords a presumption of a similar and anterior usage, if nothing is shown to the contrary. It is quite clear that an individual may claim an exclusive right to property of this description [a shore of the sea], either by ancient grant, or by prescription, or usage, independently of such grant."⁴ It has, however, been said, that the public right of navigation cannot be defeated by a private user for twenty years; and that such a public right can only be determined by an act of parliament, or a writ of *ad quod damnum*, and an inquisition found thereupon by a jury.⁵ And even the latter proceeding, it appears, does not exclude the question of nuisance or no nuisance.⁶ We must, however, remark, that if a private right of fishing be proved, it must be presumed to have originated before *Magna Charta*, and then the crown was unrestrained, and the existence of ancient weirs and the setting of stake-nets, which undoubtedly prejudice the public right of passage, seem to show that the positions we have just cited need some qualification.

The present modes of fishing in the river Tweed (excluding the stake-nets, which are only of recent use), are by stell-nets, wear-shot and ring or bob nets. The wear-shot net is rowed by the means of a boat into the river in a circular form, and is immediately drawn to the shore. The stell is a net of a similar shape, and is likewise rowed into the river, but in a semi-circular shape; a rope attached to one end of it is held by the fisherman on shore, and to the other extremity is attached an anchor, which is fastened in the bed of the river. The fishermen in the boat then go to near the centre of the net on the outside of it, and take hold of it; and when they

¹ *De Jure Maris*, chap. v.

² *Fowler v. Sanders*, Cro. Jac. 446.

³ Per Buller, J., 4 T. R. 440.

⁴ Per Richardson, J., in *Chad v. Tilsed*, 2 Brod. & Bing. 403; S. C. 5 Moo. 197.

⁵ *Rex v. Montague*, 4 Barn. & Cr. 598; *Weld v. Hornby*, 7 East, 195.

⁶ *Rex v. Ward*, 4 Ad. & Ell. 384.

either feel fish strike against the net or see them approach within its reach, they give notice to the men on the shore, and while the latter haul in their end of the net, the men in the boat hoist the anchor, and row with it to shore. The ring or bob net is a long net without any bosom, which the other nets have, and is fixed in a straight line, perpendicular to the shore, in the river, by a stone or anchor at the one extremity in the river, and to a post or *ring* on the shore. This kind of net does not, like the others, require the constant attendance of the workmen; the meshes are sufficiently large to allow the head only of the salmon to pass through them, and when they find they cannot proceed, they attempt to turn, and are caught by the gills, and the fishermen at their leisure remove them from the net.

In the salmon fisheries in the Tyne the wear-shot net above described, there called the draught net, is alone used. With reference to these fisheries, the following letter, written by the celebrated naturalist and wood-engraver, Mr. Bewick, as enthusiastic in his love of angling as Isaac Walton himself, will be read with interest:—

“ Newcastle, April 26th, 1824.

“ Mr. H.,

“ Sir,—I have met with few things in passing through life that have given me more pleasure than the information you have this morning imparted to me respecting Mr. Brandling's intention of laying before parliament the various causes which, taken together, throw obstructions in the way of the salmon tribe from breeding in the Tyne in the same overflowing numbers as of old, and in putting together a few remarks, in as short a way as time permits, to state my opinions as to the reasons for such an immense falling off. When a boy, from about the year 1760 to 1767, I was frequently sent by my parents to the fishermen at Eltringham Ford to purchase a salmon, and was always desired not to pay 2*d.* a pound, and I commonly paid only 1*d.* and sometimes 1½*d.*; before, or perhaps about this time, I have been told an article had been always inserted in every indenture of apprenticeship in Newcastle that the apprentices were not to be forced to *eat salmon above twice a week*, and the same bargain was made with common servants. I hope the time will shortly come when the same overflowing bounty of Providence will again enrich my beloved Tyne. Whatever obstructions are thrown in the way to prevent the salmon from ascending

as far up the river and rivulets as they can reach for the purpose of spawning, is the first and great cause of the breed being thinned; therefore every wear and every dam ought to be removed. The fishermen's wears are bad, but of these Bywell dam is the worst; they both have their rise in a greedy and selfish disposition,—to prevent other fisheries from catching or partaking in a due share of the fish. You will be able as well as I can to point out to Mr. Brandling the evils arising from the use of nets of various kinds which obstruct the fish from ascending the river, as well as those which arrest the fry on their way to the sea. Should the business of the dams and wears be settled, then river conservators should be appointed to guard the spawning fish (usually called Kipper fish) from being killed (which they are) in this sickly state. These conservators ought also to be empowered totally to prevent *wicked destruction* occasioned by putting lime into rivulets, as they kill millions of spawn as well as every living creature in the water within its extended reach. Fishermen may grudge to see the fair angler fill his creel with a few scores of the fry, which would, perhaps, return to them as salmon in a short time; but when it is considered that a pair of salmon will breed more of this fry than all the fair anglers can catch from the head to the foot of the river in a season, I think it is cruel to debar such from enjoying this diversion. Fish are not like game which are fed by the farmer, their food costs nobody anything, and ought only to be preserved so far as may be for the public good; therefore I have always felt disgusted at what is called preserved rivers. In these, because they run through the land of some freeholder, the fish is usually claimed as his own; the disposition which dictated claims of this kind is the same which would, if it could, restrict the use of the sun and the rain. The angler is debarred the most delightful of all recreations, which ought to be the birthright particularly of the sedentary and studious. It is the healthiest, and, comparatively, the most innocent of all diversions; it unbends the mind, and enables such, and the pale artist, to return to his avocation or studies with renovated energy to labour for his own and the public good. I ought also to name to you the uncommon destruction of the fry which frequently happens when they are hastening to the sea, by the stopping a mill race with thorns, and then letting the water off some other way, by which it has been known that a cart-load of fry have been taken at once. I named to you a kind of wear which ought to be made out of the tide-mark to increase the depth of every river in the middle, by which a more equal chance would be given to all fisheries to come in for their due share, and at much less trouble and expense than they have hitherto

been put to, and would, besides, open a free passage for the fish to where they instinctively ascend to the proper spawning ground.

"I am yours, &c.

"THOS. BEWICK."

In *Richardson v. Mayor of Orford* the general right of fishing for oysters in an arm of the sea was assumed, and was established by the judgment upon error.¹

It appears by the act of 2 Hen. VI. c. 15, cited above, that all standing or stationary nets, placed across any river, are illegal, and the party placing them is liable to an information at the suit of the crown for the penalty thereby imposed; and the proprietor or lessee (if by deed) of any fishery injured thereby might maintain an action on the case: and if stake nets, or other stationary nets, have been recently introduced into any river, it would seem that such an action might be maintained independently of the provisions of the statute just referred to. For assuming that the party placing the net has an exclusive fishery in the locus in quo, such right in a navigable river can only be claimed by prescription, and custom is the measure of such a right as against other parties entitled to similar rights of fishery in the same river; so that if a right of fishery has only hitherto been exercised by means of a particular net, as for instance the common draught net, the party entitled thereto cannot make use of any other net or engine by which the fishery of his neighbour may be prejudiced; for as the terms of the grant assumed cannot now be ascertained by an inspection of the document, usage or custom is the only means of determining the extent of the right of the grantee. It would seem that such an action would be maintainable without proving especial damage, as any novel mode of fishing, if not interrupted, would grow into a right.

If too the proprietors of private fisheries could lawfully use any sort of net they pleased, they might infringe upon the rights of the public. For instance, the crown might grant to A. B. the exclusive right of fishing for salmon with draught nets within certain limits, intending that the public should have the right as to other kinds of fish. Now it is manifest that if A. B. were allowed to fish for salmon with any kind

¹ 2 H. Bl. 182, in error; and see 12 Ad. & Ell. 18.

of net or engine he thought proper, the rights of the public might be materially affected; and unless A. B. can produce his grant, he would be confined, we apprehend, to such a mode of fishing as the usage and custom of himself and predecessors in title authorised.

The terms "*several*" and "*free*," which are frequently applied to private rights of fishery, have been the subject of much learned dispute.¹ Lord Coke seems to have considered the latter as synonymous with common of fishery; whereas Lord Hale, speaking of fresh water rivers, says,² "one man may have the river and soil thereof, and another the *free* or *several* fishery in that river;" and Blackstone defines a free fishery to be an exclusive right of fishing in a public river, considering, we suppose, free to mean free from the interruption or denial of any other person; just as a free chapel means a chapel, not free and common for the use of the public in general, but free and exempt from the jurisdiction of the ecclesiastical ordinary. And Lord Mansfield, in *Powell v. Millbank*,³ speaking of a perpetual curacy, where there was neither rector or vicar, called it a *free* curacy. In *Smith v. Kemp*,⁴ Eyre, J., said, with reference to a free fishery, that *libera ex vi termini* did imply common, but this was denied by Holt, C. J., and Dolben, J.; and with good reason; for free in our law means exclusive, the very contrary of a right held in common with others; e. g. free-hold, *liberum tenementum*—free-warren, *libera warrena*—and free-chapel: so lands held in frankalmoigne are held exclusive and discharged of every temporal service, and the meaning of frank-marriage is the same;⁵ and to these we may safely add free-fishery. And in theology we have "*free-will*," a will which excludes and is independent of all foreign influence and domination: and in the English translation of the Bible we have a remarkable instance that *free* and *several* are synonymous terms. In 2 Chron. xxvi. 21, it is written, "and Uzziah the king was a leper unto the day of his death, and dwelt in a '*several*'

¹ Co. Litt. 122 a, note.

² 1 Harg. Law Tracts, p. 5, 18.

³ 1 T. R. 399, note.

⁴ 2 Salk. 637.

⁵ Co. Litt. 21 b; and see Lord Coke's Dissertation on the word "*free*," 94 b, which however is not very satisfactory.

house;" and the margin gives as the more literal rendering of the Hebrew, "free" house. Thus a several or free fishery means only a private or exclusive fishery, and that is the meaning of the word several as used by Bacon and Hooker;¹ and it appears that the origin of "free" is a word signifying to *separate*,² which justifies the authors of our legal phraseology.

II. As to the right to the soil or ground of the sea shore, and of its creeks and arms.

Although it is true that the shore of the sea, and the soil and ground of its creeks and arms are frequently parcel of the manor adjacent, and so may belong to a subject, yet *primâ facie* they are the property of the crown.³

The evidences to prove the right of a subject are commonly these: constant and usual fetching of gravel and sea weed and sea sand between the high-water and low-water mark, and licensing others to do so; inclosing and embanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor; and such like.⁴ So having wears or fishing places, and a prescriptive right to use stake nets is some proof. But having a several fishery is only very slight evidence. "Much discussion has taken place at different times as to whether a several fishery necessarily imports an ownership of the soil; but considering the nature of the franchise, I have no difficulty in saying that in my judgment this is not a territorial but an incorporeal franchise." Per Bayley, J.⁵ There is no magic in the word "several" or "free;" it simply means, as we have seen, separate or appropriated; and in the ancient grants of the fisheries in the Tweed and Tyne, till about the reign of Elizabeth, it is seldom found. In the case of some of the fisheries in the Tyne, the owners are not owners of the ground upon which they are exercised, and we believe very few of

¹ See Johnson and Webster's Dictionaries.

² Webster's Dict.

³ Hale de Jure Maris, chap. iv.

⁴ Hale de Jure Maris, chap. vi.; Chad v. Tilsed, 2 Brod. & Bing. 403; S. C. 5 Moore, 185.

⁵ Duke of Somerset v. Fogwell, 5 Barn. & Cress. 884.

the owners of fisheries in the Tweed, though certainly "several" fisheries, are proprietors of the soil. The following opinion was given by Chief Justice Tindal, in 1826, when at the bar: "I am of opinion that the owners of the fishery of O. will not be able, under the circumstances stated in this case, to establish their claim to the soil between high and low-water mark. The word 'fishery' does not of itself necessarily carry the right to the soil. The soil may be in the crown, or in the lord of the adjoining manor, whilst the fishery is in another person.¹ And in the case of a grant from the crown, which is always very strictly construed, a grant of the fishery without any words to denote the grant of the land covered with water, or the land between high and low-water mark, would not pass 'the soil' to the grantee; and the mere general words which follow after the particular description would not, in the case of the king's grant, be of any assistance.² I therefore think the grant to T. C. did not carry to him the land in question under the description of 'fishery,' although under the word 'manor,' if the land between high and low-water mark was always considered part of the manor, he might have taken it. But that will make no difference as to the proprietors of the fishery, who claim the same through T. C. by a grant of the fishery alone, the manor having been previously granted to other persons. And as I think, upon the construction of the royal grant, the land did not pass, so the acts of enjoyment are of too equivocal a nature to lead to any presumption of a grant of the soil at any separate time; for all those acts are as well to be referred to an easement on the soil of another person, as to a right to the soil itself: and I see no solid distinction that can be drawn between the shore between high and low-water mark of the Q. fishery and that of the O. fishery which I have before considered. The grant of a right of fishery to a subject will not deprive the rest of the subjects of the land of the right to navigate the water, &c.; but I think no subject has a right so to exercise the navigation of the water, or the landing from boats, or the anchoring them, or the reloading them, as to obstruct or disturb any other subject in a right

¹ See *Hargrave's Co. Litt.* 122, n. 7.

² See the case of the *Fishery of the Baun*, *Davies's Rep.* 55.

which he has legally acquired. I think the proprietors of the fisheries may maintain an action for the injury they receive from the exercise of the several acts above referred to, in such a manner and to such an extent as to interfere with the enjoyment of the fishery before granted by the crown. Although, however, an action is maintainable, it would be very difficult to establish it by evidence against each individual, so as to show his excess in the enjoyment of his right." No action was brought.

Thus we see that the right to a fishery does not include the property of the soil, though of necessity, at least in the case of salmon fisheries, a right to use the soil is included. At all the fisheries in the Tweed the workmen exercise the right of walking over and along the adjoining shore while drawing their nets from the river. They also exercise the right of drying their nets on the adjacent banks, called "a net green," and to many of the fisheries on the Tweed is attached a building called "a shiel" or "shield," in which the fishermen at certain seasons keep their nets, &c. and use as a dwelling.

But these rights may be considered as mere easements, for the fisheries here referred to were originally held together with the adjoining lands, and were granted off and separated without any land being included. The uninterrupted enjoyment of such an easement for twenty years is a sufficient ground for presuming a grant.¹

We may observe that neither the public right of navigation or of fishing, includes any right to use the banks or adjoining lands. A common law right to use towing paths was denied in *Ball v. Herbert*² and *Blundell v. Catterall*.³ Acts of parliament have from time to time been passed to give parties engaged in the herring fisheries a right to use the adjoining lands in certain cases.⁴

¹ *Gray v. Bond*, 2 Brod. & Bing. 667; S. C. 5 Moo. 527. See now, 2 & 3 Will. 4, c. 71; and 3 Mee. & Wels. 229, 230; 4 *ibid.* 256, 496; 5 *ibid.* 233; 6 *ibid.* 795.

² 3 T. R. 253.

³ 5 Barn. & Ald. 268. A public right to have a towing path on both sides of the river Severn was confirmed by 33 Hen. 5, c. 12.

⁴ 1 Jac. 1, c. 23; 29 Geo. 2, c. 23, s. 2; 30 Geo. 2, c. 30, s. 7; 11 Geo. 3, c. 31, s. 11.

So the public have not a common law right to get sand from the sea shore,¹ nor to pass over the shore in order to bathe.²

The right of the crown in navigable rivers is two-fold, the right of property, and the right of conservation; and these rights are perfectly distinct, and may both be transferred and separated. Thus the corporation of Newcastle-upon-Tyne are the conservators of the whole of the River Tyne, so far as the tide flows, but they are not the owners of the soil or bed of that river, at least not of the whole of it. Where the right of conservation is retained by the crown, it is exercised by the Admiralty. No quay or other encroachment can be made upon the soil or bed of a navigable river below high water mark, whether the same belong to the party making the erection or not, without the licence of the Admiralty, or other person in whom the conservation is vested: and the act 46 Geo. III. c. 153, requires that notice shall be given to the Admiralty, before any quay, &c. is erected in a tide river, although the conservatorship shall have been transferred. But the ownership of the soil, and the licence of conservator, though both indispensable, are not sufficient to legalize an erection in a tide river. The question of nuisance or no nuisance may still be raised, and that may be tried by indictment. The Coal Staiths indicted, in the famous case of *Rex v. Russell*,³ were erected under a licence from the mayor and burgesses of Newcastle, but that was never thought sufficient to legalize them. On the trial of an indictment for a nuisance in a navigable river by erecting an embankment in the water way, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counter-balanced by the public benefit arising from the alteration, amounts to a verdict of guilty. It is no defence to such an indictment, that although the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the port.⁴ A slight, uncertain, and contingent injury to navigation, will not sustain a verdict of guilty.⁵

Land formed by the gradual declining of the sea, is the

¹ 7 Jac. 1, c. 18.

² *Blundell v. Catterall*, 5 Barn. & Ald. 268.

³ 6 Barn. & Cres. 566.

⁴ *Rex v. Ward*, 4 Adol. & Ell. 384.

⁵ *Rex v. Tindall*, 6 Adol. & Ell. 143.

property of the owner of the adjoining lands, and not of the crown.¹ The law is otherwise if land be suddenly left by the sea.

If the shore of the sea or arm of the sea be conveyed, the shore or space for the time being between high and low water marks, though those limits be changed, passes to the grantee.²

“As touching islands arising in the sea, or in the arms, or creeks, or havens thereof, the same rule holds which is before observed touching acquets by the reliction or recess of the sea, or such arms or creeks thereof. Of common right and *primâ facie*, it is true they belong to the crown, but where the interest of such districtus maris or arm of the sea, or creek, or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject will belong to the subject, according to the limits and extent of such propriety.”³ It was lately stated in a newspaper, that for a long series of years an island has been gradually forming between Wittonness and Oysterness, in the Humber, and that its present extent is about 300 acres. In conformity with the law contained in the above extract from Hale, the property of this island seems to be admitted to be in the crown, and a lease of it has been granted by the Woods and Forests.

W. C. W.

¹ Rex v. Lord Yarborough, 3 Barn. & Cr. 91; S.C. 5 Bing. 163.

² Scratton v. Brown, 4 Barn. & Cr. 485.

³ Hale de Jure Maris, part i. chap. vi.

ART. IV.—LAW MAXIMS.—ACTS OF GOD OR THE LAW.

ACTUS DEI nemini facit injuriam.¹

Actus legis nemini est damnosus [*or facit injuriam*].²

Actus curiæ neminem gravabit.³

Nemo punitur sine injuriâ, facto, seu defaultâ.⁴

We will venture to paraphrase the first of these apophthegms thus, "The act of the Almighty injures no one:" *or*, "is so viewed or dealt with by the law, as to affect no one injuriously." The others may stand as follows; "The act of the law or of a court shall not damage or oppress any [innocent] person. No one is punished without wrong, [guilty] act, or default [proved against him].

The above is the outline of legal dealing with the results of all paramount disposing power, as well as inevitable accident, in their influence on human affairs.

The "act of God" in the maxim, has been limited by Lord Mansfield to the meaning of some *natural* necessity, and inevitably such, as storms, lightnings, and tempests; viz. something in opposition to the act of man, or which could not happen by his intervention: for every thing might be called the act of God, as happening by his permission and knowledge.⁵ Yet the misfortunes arising from tempest cannot be said to be directed by God, but like any injurious act of man, as robbery, &c., to be permitted by him.⁶

Death, however, is one of those dispensations which has in all time produced effects on society occasioning the most constant application of the first maxim. One of the most familiar instances is that where the right to occupy land depends on the continuance of the life of the occupier, or some other person, and is put an end to by the death of either occurring after any artificial crop which returns an annual profit, has been planted, but before its severance at maturity. Under these circumstances, it has been always held, that the occupier, who lawfully planted the land, is by himself or his

¹ 2 Bla. C. 122.

² 2 Inst. 287; 2 H. Bla. 333.

³ Jenkins's Centuries, 118.

⁴ 2 Inst. 287.

⁵ See *Trent Navigation v. Wood*, 3 Esp. C. 131; and *Forward v. Pittard*, 1 T. R. 33.

⁶ See *Forward v. Pittard*.

legal representative entitled to the year's profits, if the crop be of a species which ordinarily repays the labour by which it is produced within the year in which it is bestowed;¹ whereas if it proceeds annually of itself, without necessity for labour or manurance of man, as grass does,² or is permanent in its nature, as young oaks, fruit trees, &c.³ or, as it seems, if it be a crop which does not come to perfection for two years, as teazles,⁴ or if the occupier has severed one mature crop since his right to hold terminated,⁵ the sudden divesting of that right by the act of God, does not confer on him any right to indemnity.

Such profits are called "emblements" (literally, "sowings," from the old Norman word "embleer"), and the right to them rests entirely on the uncertainty of the occupier's estate, which has determined by the act of God before the year's crop was ripe and severed.⁶

Where a party demised for fifty years, if he should so long live, at a rent payable quarterly, at Lady-Day, &c. "or within thirteen weeks after," and died before the extreme time for payment, viz. within thirteen weeks after Lady-Day, it was held,⁷ that her executor had no remedy for the quarter's rent due at Lady-Day; for the extreme time limited for payment by any contract, is the legal time for making it, and before 11 Geo. II. c. 19, s. 15, and 4 Will. IV. c. 22, the executor of a tenant for life could not claim a rateable pay-

¹ *Graves v. Weld*, 5 B. & Adol. 105; and see *Bulwer v. Bulwer*, 2 B. & Ald. 470; 2 Bla. C. 122; *Eaton v. Southby*, Willes, 131.

² So, though tenant improve its quality, *Co. Litt.* 69 a; 5 B. & Adol. 114.

³ *Co. Litt.* 55 b; 2 Bla. C. 122, though planted by tenant.

⁴ Though in one case teazles were held to be the subject of emblements, *Kingsbury v. Collins and Elmes*, 4 Bing. 202, the attention of the Court does not seem to have been drawn to the biennial return of the crop (see 5 B. & Adol. 114). However the decision may have turned, on their being *like* emblements, on the ground of the labour required in the second year, and so within the rule as to hops, *id.* 120. *Quære*, as to liquorice, madder, &c. *id.* 109.

⁵ *Graves v. Weld*. The crop was barley, with clover sown on it at a subsequent time, before the death in question. The party who sowed took the barley crop, with such of the clover as could be cut with it: Held, that his right to emblements of the clover stopped there, and did not continue longer than a year from the sowing.

⁶ *Com. Dig.* tit. *Biens* (G 2).

⁷ *Clan's case*, 10 Co. 127 a; see *Arundel v. Combe*, *Dyer*, 262.

ment of rent down to the death of the tenant for life, if occurring before a fixed day of payment.

Where by an irruption of the sea, part of land demised to a tenant is surrounded or covered with it, and thereby entirely lost to him without his default, this act of God entitles him to a rateable apportionment of rent;—for in ordinary intendment there is neither probability of regaining the soil, or exclusive right in the tenant to any casual profit of fish, &c.¹ but a distinction is made where a similar loss occurs from fresh water, *e. g.* floods, &c., because such injuries are usually temporary, and the tenant having the sole right to the casual profit of fish, &c. must run the hazard of casual losses, and not throw their burden entirely on the lessor.² Nor will a court of equity relieve him.³

Again, the burning part of the land with “wildfire,” [*qu.* lightning], is said to be no reason for apportioning the rent: for the land remains, and its former fertility may be renewed, by the tenant’s labour.⁴ A man granted a lease for years of land and a flock of sheep, at a certain rent. All the sheep died, and after several arguments, the lessee was held entitled to apportionment of the rent, on the ground that he had been guilty of no default, though several of the judges held him still liable for the whole rent, for as the death of the sheep was the act of God, there was no default in lessor or lessee.⁵ This decision seems analogous to the law of apportionment of rent on eviction; for rent is apportionable when part of the demised premises is recovered or evicted by title paramount to that of the lessor, and independent of any act of his, but not where the lessor himself, by his own act, *e. g.* previous demise of a part, has prevented the second lessee from having lawful possession of that part; in which case the second demise is wholly void as to it, and the lessor cannot distrain for the whole or any part of the rent.⁶

¹ Roll. Abr. tit. Apportionment (C.), Act de Dieu; 7 Bac. Abr. 49, tit. Rent (M. 2); Dyer, 56, though in part contrary, is merely illustration.

² Ibid.; and see *Paradine v. Jane*, Aleyn’s Rep. 79, as cited 6 T. R. 752; *Snape v. Dobbs*, 1 Bing. R. 204; 7 Bac. Abr. 50.

³ *Harrison v. Lord North*, 1 Chan. Cas. 83.

⁴ Roll. Abr. ubi supra.

⁵ Dyer, 56 a.

⁶ *Neale v. Mackenzie*, 1 M. & W. 747; Cam. Scacc. (in Error); see 1 M. & Gr. 747.

By the custom of the realm, that is, by the common law, a carrier of goods is in the nature of an insurer of them liable for every accident, however inevitable, if occasioned by human means (e. g. irresistible force of robbers), and not by the act of God, as storm, lightning, &c. or the king's enemies.¹ For to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows the loss was occasioned by act of the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.² Every thing done by the carrier which the law does not excuse, is negligence in him, e. g. loss of goods in his hoy, owing to a leak made by rats.³ Whereas in the case of a similar loss from the sinking a hoy by a sudden gust of wind, in shooting old London Bridge, the carrier was exonerated.⁴ However, in the case of injuries to *passengers*, carriers are only liable for their own or their servants' negligence, and not for unavoidable accident.⁵

A power of attorney, or to represent another, necessarily determines with the death of the person to be represented,⁶ particularly if coupled with an interest.⁷

The death of a plaintiff or defendant who sues or is sued singly, if happening before interlocutory judgment or verdict, (i. e. before the first day of an assizes or sittings after term in London or Middlesex,⁸ or before the actual day of trial of a cause at the sittings *in term*,⁹) puts a stop to and abates the action, thereby making any subsequent final judgment against either reversible as an error in *fact*:¹⁰ but a like event taking

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; Year Book, 9 Edw. 4, 40; *Mors v. Slue*, Sir T. Ray. 220, 1 Vent. 190, 238, 1 Mod. 85, S. C.; *Syms v. Chaplin*, 5 Ad. & E. 634.

² See *per Cur.* *Forward v. Pittard*, 1 T. R. 33; Bac. Abr. tit. Carriers (B).

³ *Per Lee, C. J.*, *Dale v. Hall*, 1 Wils. 282, cited 1 T. R. 31.

⁴ *Amies v. Stephens*, Stra. 128.

⁵ *Aston v. Heaven et al.* 2 Esp. N. P. C. 533, per De Grey, C. J.; see *Wakeman v. Robinson*, 1 Bing. 213; *Christie v. Griggs*, 2 Campb. 79; and 3 Bing. 319.

⁶ 1 Bac. Abr. tit. Authority (A); see Co. Litt. 52 b; *Wallace v. Cook*, 5 Esp. C. N. P. 118; *Lessard v. Vernon*, 2 Ves. & B. 51.

⁷ *Watson v. King*, 4 Camp. 272.

⁸ *Jacobs v. Miniconi*, 7 T. R. 31; see 1 Salk. 8; 2 Lord Ray. 1415.

⁹ *Taylor v. Harris*, 3 B. & Pul. 549.

¹⁰ Cases collected, Tidd, 9th edit. 1136.

place on or after the first day of an assizes or sittings after term in London or Middlesex, or on *the* day of any sittings *in* term there, at which a verdict may be obtained, will not now prevent final judgment being entered on it within two terms afterwards.¹ Another act hinders the abatement of an action by the death of one of several plaintiffs or defendants, where the cause of action survives to or against the rest,² or by the death of any *such* plaintiff or defendant, sued or suing singly, if occurring after interlocutory judgment,³ thus distinctly recognizing the maxim "*actio personalis moritur cum personâ*," in actions not arising like the above, *ex contractu*. If a defendant submits to a verdict against him, having leave to move for a nonsuit, and dies in the term after the trial, after the rule granted, but before the argument, his representatives may avail themselves of the rule being afterwards made absolute, to enter up judgment, as of the term next after the trial, so as to get the costs of the judgment; for the delay was the act of the Court.⁴ And though a judgment has no longer any relation back but to the day when signed, the Court or a judge may still order judgment to be signed *nunc pro tunc* in the above cases.⁵

Again, the death of a defendant while charged in execution, or after an *elegit* issued against him, will not prevent the plaintiff from having a new execution against his land or goods; for the defendant's death is no satisfaction to the plaintiff, but is the act of God, which shall not turn to his prejudice.⁶ Though this was held otherwise both before and after *Blumfield's case*, on the principle of "*mors solvit omnia*;" *st. 21 Jac. I. c. 24*, now enforces the doctrine above laid down.

Our space will only allow the illustration of our maxim thus far by tracing some of the broader effects of the *death* of a litigant party pending the suit; but we will add, that

¹ 17 C. 2, c. 8.

² 8 & 9 Will. 3, c. 11, s. 7.

³ *Id.* s. 6; 4 Burr. 2277.

⁴ *Toulmin v. Anderson*, 1 Taunt. 385; see other cases, *Tidd*, 9th edit. 932.

⁵ *Lanman v. Lord Audley*, 2 M. & W. 535; *Evans v. Rees*, 12 Ad. & E. 167; *Harden v. Forsyth*, 1 Adol. & Ell. (New Series) 177.

⁶ *Blumfield's case*, 5 Co. 87 a; *Cro. Fl.* 555; S. C. citing *Trewinyard's case*, *Dyer*, 60; *Godbolt*, 273; see *Nadin v. Battie and another*, 5 East, 147; other cases collected, *Tidd*, 9th ed. 1034.

where the *birth* of a nearer heir, for instance, of a posthumous son, pending an action by a daughter as heiress of the party last seised, divests that daughter's estate, her action abates, for her whole right of action is defeated by the event.¹ Whereas a plaintiff's writ does not abate if a dignity afterwards accrues to him by the mere act of God occasioning a descent of it, *e. g.* if the death of his kinsman unavoidably casts a title on him which thus becomes part of his name.²

If the law creates a duty which the party without his own default becomes unable to perform, without any remedy over, the law will excuse him if by the act of God its performance becomes impossible. Thus the destruction of a house or gaol by tempest (or the king's enemies), excuses the lessee or gaoler from proceedings in waste.³ If the surface of a meadow is destroyed by the eruption of a moss, or enemies should land and dig it up, that would be no waste in the tenant, but the act of God or of a hostile force, that *vis major* for which he is not responsible.⁴ However, a lessee for years or a copyholder tenant of a house, though not covenanting to repair or rebuild, is liable for waste by the general rule of law; and if the premises are burnt without lightning or act of God, must rebuild in convenient time.⁵

If one is bound by prescription to repair a wall against the flowing of the sea, yet "*impotentia excusat legem*," and that which comes by the act of God, and is so inevitable that by no providence or industry of him that is bound it can be prevented, shall not charge him; therefore if a tenant for life or years does not repair a sea wall, so that by his fault the land is drowned and becomes unprofitable, it is waste; but if the land is drowned by the extraordinary rage and violence of the sea without his fault, it is not waste any more than if a house is burnt by lightning or overthrown by the

¹ Com. Dig. tit. Abatement (H. 40); 1 Co. 242; 3 id. 61.

² Com. Dig. tit. id. (H 44).

³ Year Book, 33 Hen. 6, c. 1. So the gaoler is excused for escapes, 1 Rol. Ab. 808.

⁴ Per Tindal, C. J. in *Simmons v. Norton*, 7 Bing. 648; but see *arguendo*, 10 East, 530.

⁵ Dict. by Lord Hardwicke, Ch. *Rooke v. Warth*, 1 Vcs. sen. 462; see 10 Coke, 139 b; *qu. tamen*, Co. Lit. 57 a, Hargrave's note (1).

rage of the wind or tempest without fault in the lessee, which is no waste.¹

And where a party by his own contract creates a duty or charge on himself, he is bound to make it good notwithstanding any accident by inevitable necessity, or to answer for the breach of it in damages, because he might have provided against it by his contract.²

Thus, if a rent is reserved on a lease, or lessee covenants to pay it, or to keep a house in repair, he is liable on these covenants, though it is destroyed by lightning or tempest or in civil war,³ even to the extent of rebuilding it if the covenant be to keep and leave the premises in repair.⁴ For though had he covenanted to repair it under a *penalty*, he would have been excused by the circumstances from paying it;⁵ he is bound by his own covenant to repair it in convenient time afterwards.⁶

Again, a general covenant to erect in a substantial manner a bridge, and keep it in complete repair for seven years, was held to compel the rebuilding it if washed away within that time by the act of God in an extraordinary flood; for any loss of that kind might have been excepted from the contract.⁷

However it was held in 40 Edw. III. that if a tenant covenants to leave any natural production on his land (*e.g.* a wood) in as good condition as it was at the time of the lease, he is not liable on his covenant for any injury aris-

¹ Keighley's case, 10 Coke, 139.

² *Paradine v. Jane*, Aleyn's R. 27, Style, 47, S.C. recognized in 6 T.R. 650; and *Atkinson v. Ritchie*, 10 East, 533. See Year Book, 40 Edw. 3. 5. Brook's Ab. tit. Covenant, pl. 4; *Jeakin v. Linne*, Hetley, 54; *Digby v. Atkinson*, 4 Camp. 275; *Beale v. Sanders*, 3 Bing.N.C. 850; also 3 Burr. 1637, 1593; *Dyer*, 33; *Doctor and Student*, Dial. ii. c. 4; 3 M. & Sel. 267.

³ See *Doctor and Student*, 29, cited *Palmer*, 549; *Paradine v. Jane*, Aleyn, 20; S.C. Style, 47. Plea of eviction by Prince Rupert, styled a German prince, enemy to king and kingdom, invading the realm with hostile array; and see *Harrison v. Lord North*, 1 Chan. Cas. 83.

⁴ *Pym v. Blackburn*, 3 Ves. 24; *Bullock v. Dommitt*, 6 T.R. 651.

⁵ *Anon. Dyer*, 33; Year Book, 40 Edw. 3, 6.

⁶ *Ibid. Chesterfield (Earl) v. Bolton (Duke)*, Comyns's R. 627; *Bullock v. Dommitt*, 6 T.R. 651; *Poole v. Archer*, Skinner, 210; 2 Shower, 401; S.C. *Compton v. Allen*, Style, 162. He may use the materials which remain, Co. Litt. 53 a; see *Bowles's case*, 11 Co. 82.

⁷ *Brecknock Canal Navigation Company v. Pritchard*, 6 T.R. 750.

ing to it from the act of God; as if some of the trees are blown down by tempest; for to keep the covenant has become impossible, and "*impotentia excusat legem.*"¹

If a lessee covenants in a penalty to repair a wall against a river, so that a meadow shall not be overflowed, if by an outrageous and sudden flood which had subverted certain wears, the wall is thrown down and the meadow overflowed, this act of God excuses from the penalty, but the wall must be repaired in due time according to the covenant.²

The above state of the law often occasions express exceptions of casualties by fire and tempest from the tenant's liability or general condition to repair.³ But if they are so specially excepted, the tenant will nevertheless be bound by his implied⁴ or express covenant to pay rent during the term, and this though the premises are burnt or blown down and remain uninhabitable.⁵ For without express covenant a lessor is not bound to rebuild.⁶ Nor will a Court of equity prevent him by injunction from proceeding at law for the rent till the premises are rebuilt,⁷ even if the lessor has received a sum for which he insured them, and will not expend it in reinstating them.⁸

When a loss is accidental, the maxim is "*res unaquæque*

¹ Year Book, 40 Edw. 3, 6, as cited in Shelley's case, 1 Co. 98 a; Fitzh. Abr. tit. Covenant, 16; Perkins, sect. 738; see Sheppard's Touchstone, 173; Ingoldsby v. Wivell, Hardres, 387.

² Anon. Dyer, 33 a; Com. Dig. tit. Covenant (E.)

³ 2 Saund. 5th ed. by Williams, 422, note (2); Bullock v. Dommitt, 6 T. R. 651.

⁴ Paradine v. Jane, ubi supra.

⁵ Monk v. Cooper, Lord Raym. 1477; Baker v. Holtzappel, 4 Taunt. 45; 18 Ves. 115; Izon v. Gorton, 5 Bing. New C. 501. See Packer v. Gibbins, 1 Ad. & E. New Series, 421. Notice to rebuild makes no difference, Belfour v. Weston, 1 T. R. 310.

⁶ Bayne v. Walker, 3 Dow's R. Dom. Proc. 253. Whether tenant has a right to abandon, quære; S. C. see Wergall v. Waters, 6 T. R. 488; Doe v. Sandham, 1 T. R. 705; Pindar v. Ainstey, id. 312; 12 East, 309.

⁷ Holtzappel v. Baker, 18 Ves. 115; Hare v. Grove, 3 Anst. 687, overruling Brown v. Quilter, Ambler, 619; 2 Eden's R. 219, S. C.; Stale v. Wright, cited 1 T. R. 708. In Holtzappel v. Baker, Lord Eldon, Ch. said, "I cannot perceive the equity in this sort of case. Suppose a demise for seven years at a rent of 100*l.* per annum, the tenant to repair in all cases except fire, and not to be liable in that case, and landlord stipulating that in case of fire he will be content at the end of seven years to take the land without the house. If they choose to make that agreement, why should they not?"

⁸ Leeds v. Cheetham, 1 Simon's R. 146; see 18 Vesey, 119.

locata (e.g. a house to a tenant) perit suo domino." Lord Redesdale held this to mean, that no person is bound to answer the consequences of an accident which destroys the "res locata." Lord Eldon, C. J. put it thus: where there is no fault anywhere, the thing demised perishes to all concerned, so that all who are interested constitute the "dominus" as to this purpose, and the loss must fall on all.¹

A bond being a thing in action and executory, no advantage can be taken of it till default in the obligor; so that in all cases where at the time of making the condition of a bond it is possible to be performed, but before default in the obligor it becomes impracticable by the act of God, the law, or the obligee, the "obligation is saved," that is, the obligor is discharged.²

This position (limited to the act of God) is repeated in *Eaton v. Butler*;³ but Whitlock and Jones, Justices, said, that where a condition is prevented by the act of God from being literally performed, it shall be performed *cy près*, or as near the intent of the parties as it can. Thus, when by the obligee's death it cannot be performed to him, it shall be performed *cy près* come poet estre, scilicet to his heirs. *Cromwel's case*⁴ had before shown that when a time is limited for performance of a condition subsequent in a conveyance, and the party to perform it dies before the day, the impossibility arising by the act of God discharges the estate of the condition; for if the grantee dies before performance of the condition, it is broken; but if the grantor dies in like manner, it is not.

Coke, in his commentary just above cited, appears to speak of conditions which, though for performing something subsequent, are not stipulated to be performed before any given time, and must therefore be at once performed, or remain undone at the obligor's peril: for if a man *covenants* to do a thing before or at a *time certain*, then its becoming impos-

¹ See *Bayne v. Walker*, 3 Dow's R. Dom. Proc. 253.

² See *Roll. Ab.* 449, 451; *Com. Dig.* tit. Condition (D 1), (L 12); *Graydon v. Hicks*, 2 Atk. 18; *Co. Litt.* 206.

³ 4 Car. 1; *Sir W. Jones*, 180; *Palmer's Rep.* 552, S. C.

⁴ 2 Co. 69.

sible by act of God will not excuse him, inasmuch as he had bound himself *precisement* to do it.¹

However, a man covenanting to build a house before a given day was held excused from performance at the *day*, by reason of the plague being at the place; for the law would not bind him to venture his life for it, though he must build it afterwards.² So, if a party who undertakes by parol is before breach of his promise disabled by the act of God from performing it, he is excused; *e.g.* if a man lends B. a horse for his use, who promises to re-deliver it on request, but the horse dies before request made, and without default in the defendant.³

Where a bond was conditioned in the disjunctive for performance of one of two things, both of which were possible⁴ at the time of executing the bond, but one afterwards became impossible by the act of God (or, as it seems, of the law, or a party to the deed) occurring before the obligor was bound to have made his election, Coke reports the decision to have been, that he was not deprived of it by that event or bound to perform the other part; for the condition being in the disjunctive for his benefit, shall be taken as if that part of it which is become impossible had been the only matter stipulated for in the condition.⁵

This judgment may be taken as resting on the case in 4 Edw. VI., cited by Fearn, J., from Bendloe's Reports, 35, and in *Greningham v. Ewre*, Cro. Eliz. 396.

In *Warner (or Warren) v. Whitey*⁶ the bond was by a principal debtor and a surety, conditioned that the former should pay a sum before 25th December then next, and if he did

¹ Roll. Abr. 450, l. 20, 451, l. 40; but see l. 45; Com. Dig. tit. Condition (D 1), and tit. Action on the Case on Assumpsit (G); Moore, 855.

² *Lawrence v. Twentiman*, Roll. Abr. 450; 10 East, 533; Com. Dig. Action on the Case on Assumpsit (G).

³ *Williams v. Hide*, Palmer's R. 548; sem. S. C. Sir W. Jones, 179.

⁴ If impossible at the time, *e.g.* for payment of money on a day which has elapsed before the execution of the bond, the condition is void; *Greene v. Eden*, Yelv. 138.

⁵ *Laughter's case*, 5 Co. 21 b; S. C. nomine *Eaton and Monox v. Laughter*, Cro. El. 398, Trin. 36 Eliz.; *Popham*, 98; Moore, 357; 1 Roll. Abr. 450; Com. Dig. tit. Condition (D 1).

⁶ B. R. 29 Car. 2, as vouched, 2 Mod. 201, and by North, C. J., 1 Mod. 265.

not, that he should appear in the Hilary term after to the creditor's action. The debtor died after 25th December and before the term, not having paid anything. In an action against the surety White, it was held, that the condition not having been broken by the nonpayment, the bond was not forfeited, because the obligor had the election to do one or the other, and the performance of the one becoming impossible by the act of God, the "obligation was saved," *i. e.* the obligor was excused. *Wood v. Bates*¹ also supports Coke's doctrine.

But the report of *Laughter's* case in *Croke* shows that *both* stipulations became impossible by the act of God; so that the "reason and cause of the judgment" seems not that extreme one reported by Coke. The facts were these: a bond was executed by the defendant *Laughter*, conditioned that if *Ramsford*, his co-obligor, after marrying *Jane Gilman* should sell certain hereditaments of hers, he should in *his* lifetime convey to the said *Jane and her heirs* hereditaments of equal value, or leave her as executrix, or by way of legacy, &c. as much money as he should receive by the sale. *Ramsford* married *Jane* and sold her lands; she died before he had purchased other hereditaments, and the bond was held discharged; for *Jane's* death in the obligor's lifetime was an act of God which should not prejudice him, as it had made it impossible either to leave her the legacy, or to convey land during his life to her heirs; and as they were not *named* in the condition, that word was not used with intent to describe her heirs or give them any thing, but only by way of limitation to denote the quantity of estate intended to pass.²

And the later authorities concur in declaring the law laid down by Coke in *Laughter's* case to be by no means universal; and incline to hold that the impossibility of performing one condition is no excuse for not performing another, if possible.³

¹ *Sir W. Jones*, 172. See also *Graydon v. Hicks*, 2 Atk. 18, and cases cited in the note, 1 Atk. 361; *Peyton v. Bury*, 2 P. Wms. 626; *Jones v. Suffolk*, 1 Brown's Ch. C. 529.

² *Brett v. Rigden*, Plowd. 341.

³ See per *North, C. J.*, in *Bassett v. Bassett*, 1 Mod. 265; per *Heath, J.*, *Simmonds v. Swaine*, 1 Taunt. 549; *Studholmes v. Mandell*, 1 Ld. Ray. 279; *Lutw.* 693, 683; 1 Salk. 170, S. C.; *Drummond v. Bolton (Duke)*, *Sayer's R.* 243.

In a contemporary decision¹ Walmsley, J.,² said, if one be bound in a bond conditioned to pay 20*l.* before 1st May, *or* to marry A. S. before 1st August next, if he does not pay before 1st May, and A. S. dies before the 1st August, so that the condition is become impossible by the act of God in this part, yet the bond is forfeited; "because he hath undertaken to perform the one of them, and it was his folly that he did not perform it whilst it was in his power and election to have done it."³

The rule put in *More v. Morecombe* was, that if by the act or default of a stranger, or the party himself, or the obligee, or by the act of God, it becomes impossible for the obligor to do one of two things stipulated for in a disjunctive condition, he is notwithstanding bound to do the other. But this is said by Chief Justice North and the Court of Common Pleas in 29 Car. II.³ to be true only as to the default of the *stranger*,⁴ and the Court cites Laughter's case as full in point to exonerate the obligor, where both parts of a disjunctive condition being possible at the time of executing the bond, one afterwards becomes impracticable by the act of God or the party.⁴

At all events, if the act or neglect of an obligee takes away the obligor's election to do one of two acts mentioned in the condition, for instance, if the condition is to assure 20*l.* a year to plaintiff, the obligee, within six months after a given event, or on refusal to do so when requested by the obligee, to pay him a sum of money; there, if the plaintiff did not within the six months tender the deed of annuity to be executed by the defendant, the law discharges him as to the other alternative, viz. the payment of the money.⁵

In a devise or conveyance of lands on a condition annexed

¹ *More v. Morecombe*, Cro. El. 864; Moore, 645, S. C.; see *Milles v. Wood*, id. 718.

² In 1585, Thomas Walmsley was in great practice at the bar, and got 1000 marks a year, or 666*l.* 13*s.* 4*d.*, probably equal to 4000*l.* of this day; he was made Chief Justice of the Common Pleas in 1589. See Blakeway's *History of Shrewsbury*.

³ *Basset v. Basset* (misprinted Baskett), 2 Mod. 204. See S. C. 1 Mod. 265.

⁴ And see Serjt. Strode's argument in 1 Mod. 265, as to *More v. Morecombe*; also 1 Roll. Abr. 452, tit. Condition (L).

⁵ *Basset v. Basset*, ubi supra. S. C., 1 Freem. 228, resting on *Greningham v. Ewer*, Cro. El. 396.

to the estate conveyed, which is possible at the time of making it, but afterwards becomes impossible by the act of God or the law, there, if it is *precedent*, it is void, and no estate vests at law or in equity;¹ but if *subsequent*, the estate becomes absolute in the grantee,² for the condition is not broken.

Thus where a man devised his estate to his eldest daughter, on condition that she should marry his nephew on or before she attained twenty-one years: the nephew died young, and she never refused and was never required to marry him, but after his death, and when about seventeen, married; it was held that the condition was unbroken, having become impossible by act of God.³ Again, where a man devised to his widow for life, and after her death to his daughter and her assigns for life, in case she continued unmarried, with power of appointment after death, and devise over for want of such appointment; but in case she should marry in the lifetime of the widow and with her consent, or after her death with the written consent of two persons named, or the survivor of them, the daughter and her assigns were to enjoy the lands in the same manner as if she had continued unmarried. The testator's widow, and the two other persons named, having died, the daughter took possession of the estate, and married. Held, that she took an estate for life with power of appointment, subject, as to the former, to the condition of her remaining unmarried, except with the consent of certain persons to her marriage, and as the act of God in the deaths of those persons had made compliance with this condition *subsequent* impossible, her estate for life became absolute, and she might execute the power of appointment.⁴

Again, where a man enfeoffed another on the condition subsequent, that the feoffor should within a year go to Paris about the feoffee's affairs, but feoffor died before the year

¹ Roll. Abr. tit. Condition (E); Co. Lit. 206 a, b; Popham v. Bamfield, Vernon, 63; Cary v. Bertie, 1 Vern. 340. See Co. Lit. by Thomas, 21—23; Hotham v. Ryland, Eq. Abr. 18; 2 B. Moore, 262; Lord Falkland v. Bertie, 2 Vern. 339.

² See 2 Cruise's Dig. 3d ed. 32; Co. Lit. 206 a.

³ Thomas v. Howell, 1 Salk. 170.

⁴ Aislabie v. Rice, 8 Taunt. 459; 2 B. Moore, 358; 3 Madd. R. 256, S. C.; Peyton v. Bury, 2 P. Wms. 626; Harvey v. Aston, 1 Atk. 261; Bertie v. Falkland, 1 Salk. 231; Graydon v. Hicks, 2 Atkyns, 16.

elapsed, the estate was held absolute in the feoffee ; for being vested in him, and the performance of the condition having by the act of God become impossible, his estate shall not be divested, and the land taken from him by construction of law, solely because a condition, which was made for his benefit and is to be expounded liberally for him, could not be performed.¹

No technical words are necessary to distinguish precedent and subsequent conditions, but the same words may be taken indifferently according to the testator's intention.²

When the law prescribes a means to perfect or settle any right or estate, if by the act of God, " which no industry can avoid or policy prevent," this means becomes impossible in any circumstance (*e. g.* in time), no one who was to have been benefited, if the means had been with all circumstances executed, shall be prejudiced for not executing it in that which has thus become impracticable, unless he has been guilty of some laches and has neglected something possible for him to perform.³ Thus a man may take rent or an advowson as tenant by the curtesy, though his wife dies before the rent day or avoidance ; for that act of God rendered actual seisin impossible.⁴ So where tenant per auter vie, having right to re-enter land of which he has been disseised, is prevented from such re-entry by the death of cestui que vie, he has remedy by action of trespass.⁵ Where A. covenanted to convey his estate for two lives in a church lease to B. by a certain day ; one-life dropped before the day ; B. was decreed to bear the loss, there being no fault in A.⁶ If a mortgage is to be void on condition that the mortgagor and J. S. pay a sum at such a day to mortgagee, the mortgagor's death before that day by the act of God does not disable J. S. to pay the money, for the mortgagee receives no prejudice. So had J. S. died before the day, the mortgagor might have paid it.⁷ But if the condition be that mortgagor or his *heirs* should pay by a

¹ Com. Dig. tit. Condition (D 1) ; Co. Lit. 206 a, 218 a. See id. 219 ; 2 Cruise's Dig. 3d ed. 32.

² Robinson v. Comyns, Ca. temp. Talb. 164. See Harvey v. Aston, 1 Atk. 378.

³ Shelly's case, 1 Co. R. 97 b.

⁴ Year Book, 7 Ed. 3, 66 ; 3 H. 7, 5.

⁵ Year Book, 38 H. 6.

⁶ White v. Nutt, 1 P. Wms. 61.

⁷ Co. Lit. 219 b.

certain day, then if the mortgagor dies before the day without heir, so that the condition becomes impossible by the act of God, it seems that the mortgagee's estate is absolute.¹

Again, if the profits of land, gaged by way of *vivum vadium* or statute merchant for receiving them till the debt was liquidated, were wasted by inundation of water or *wildfire* [*semb.* lightning] or any other act of God, without default or negligence in any party, the conusee of the statute merchant might hold the land over till its profits paid the debt.²

The visitation of sickness is a condition incident to humanity; and is accordingly implied and allowed for in all contracts. So that if a servant hired for a year (ending before 14th August, 1834,)³ was disabled from working by an illness not befalling him from his own default, that visitation of God did not deprive him of his settlement at the end of the year,⁴ nor, as it seems, of his wages.⁵

Timber, while standing, is part of the inheritance, and whenever severed, either by act of God, as by tempest, or by a trespasser, or by wrong, is not in abeyance, but belongs to him who has the first estate of inheritance, whether in fee or in tail.⁶ Accordingly, a remainderman so entitled may bring trover for it.⁷ Again, where during a tenancy for life there are trustees to support contingent remainders, their estate being in contingency is no estate, and as the trees, when down, must become the property of some one, the first remainderman of the inheritance in being takes them.⁸

The distinction between the act of God and inevitable necessity or accident is nice.⁹ Thus a fire may break out in an outhouse or hovel, or in an open field, from spontaneous

¹ Co. Lit. 206 a.

² Corbet's case, 4 Co. 82 b, citing Year Book, 1 H. 6, 7; 7 H. 7, 12 b; 15 H. 7, 14. See 2 Bla. C. 160.

³ 4 & 5 W. 4, c. 76, s. 64.

⁴ See Rex v. Christ Church, Burr. Sett. Cas. 494; Rex v. Maddington, Id. 675; Rex v. Islip, Stra. 423.

⁵ S. C.

⁶ Bewick v. Whitfield, 3 P. Wms. 267; Lord Talbot, Ch.

⁷ Ibid.

⁸ Per Lord Hardwick, Ch., in Garth v. Cotton, 1 Ves. sen. 527, citing Bowles' case, 11 Co. 79 b.

⁹ See per Lord Mansfield, in Forward v. Pittard, 1 T. R. 35. See Freeman v. East India Company, 5 B. & Ald. 617; Dickenson v. Watson, Sir T. Jo. 205.

ignition of substances, brought together there without the intervention of man, by the mere accident of wind, &c. which no human foresight could anticipate, and which would therefore be properly called the act of God. On the other hand, if a chemist, making experiments with ingredients which though singly innocent are when combined liable to ignite, leaves them together, or if a farmer negligently constructs a rick of damp hay near his neighbour's house, and in either case ignition follows, which does mischief to the property of another, the parties are liable.¹

*Tubervill (or Turberville) v. Stamp*² was relied on by the Court in the last case, and is of importance. It is mentioned by several contemporary reporters, many of which give a more satisfactory account of it than the solitary reference to it as stated in 1 Salk. 13, which is ascribed to the Court in 3 Bingham's New Cases. The statement in 1 Salkeld differs from the record of the case as set out in 3 Salk. 736, in some particulars. It seems that the defendant set fire to heath in his own ground, which fire was by a "*sudden wind*" carried over into the plaintiff's close adjoining, and there burnt his heath and furze. The action was on the case, and the plea not guilty. Carthew and Raymond have it, that the fire was lighted in the way of husbandry at the proper season, and that the plaintiff's servants did all their number would permit to prevent its reaching the plaintiff's land. The plaintiff, however, had a verdict, and it was afterwards moved, *not for a new trial*, but in arrest of judgment, that the driving the fire by the wind into the defendant's field was the act of God, without his neglect. The Court said that if a sudden blast occasioned the injury, it did not appear on the record, and they could not take notice of it, though it was proper matter for the defendant to rely on in evidence; and the plaintiff had judgment. They also held, according to Comyns, that the defendant was bound to have the same care of a fire which he kindles in his field as in his house, for the duty to

¹ *Vaughan v. Menlove*, 3 Bing. N. C. 468. See *Partridge v. Scott*, 3 M. & W. 220; *Davis v. Garrett*, 4 M. & P. 540; *Siordet v. Hall*, 4 Bing. 607.

² In *K. B. Mich.* 9 Will. 3. See *Lord Raym.* 264; *Comyns's R.* 32; *Skinner*, 681; *Carthew*, 425; *Comberbach*, 459; *C. J. Holt's Rep.* 9; 1 Salk. 13; 3 *id.* 736. See case of bonfire, put in *Comberbach*, 459.

take care of both is founded on the maxim "*sic utere tuo ut alienum non lædas;*" but if the defendant's fire, by inevitable accident, by impetuous and sudden winds, and without negligence of the defendant or of his servants, for whom he ought to answer, did set fire to the heath¹ of the plaintiff in his adjoining ground, the defendant should have advantage of this in evidence and be found not guilty. Raymond and Comberbach state Chief Justice Holt to have added, that if a man's servant kindles a fire in the way of husbandry, so as to be within the scope of his employ for his master, and about his business, though not by his express command, the master may be sued for damage done to another by the fire.² The above case is material to be noticed, as it seems from it that mischiefs arising from fires lighted in the field, or out of a man's "house or chamber," may still be visited on the parties by the common law and custom of England, notwithstanding 6 Ann. c. 31.³

Though, if an accident happen entirely without default on the part of the person sued for it, or blame imputable to him, an action does not lie; yet if it arises from his driving too spirited a horse, pulling a wrong rein, or using imperfect harness, it will.⁴ Again, if a man takes my hand by force and strikes another with it, or if a soldier at exercise runs across the piece which I, his comrade, am lawfully discharging, so that the injury done appears to have been inevitable, still, in the absence of all voluntary act or negligence on my part to give occasion to the hurt, the facts would be a defence to an action against me for it.⁵

The question whether in all cases the death of a principal who had in his lifetime authorized an agent to indorse bills for him revokes that power, was raised in *Murray v. East India Company*,⁶ without being disposed of, as the terms of the power of attorney in that case conferred no such autho-

¹ The record in 3 Salk. shows that plaintiff's heath and furze, not his clothes as in *Comyns*, or corn, "*blada*" as in 1 Salkeld, were burnt.

² See 6 T. R. 660; 1 East, 106; *Attorney-General v. Siddon*, 1 Tyr. 41, 51.

³ See 1 Salk. 13; Holt's R. 9.

⁴ *Wakeman v. Robinson*, 1 Bing. 213.

⁵ See *Weaver v. Wood*, Hobart, 134.

⁶ 5 B. & Ald. 204.

rity on the agent.¹ In the supposed case of a dying man giving a check to a party, who received the amount from the banker immediately after the death of the donor, and before the banker was apprised of it, Lord Loughborough was inclined to think no Court would take it from the payee.² A banker, who not being aware of his customer's death, repays himself from that customer's funds money previously advanced him on discounting his acceptance, is entitled to retain it.³

The prerogative of the crown in things not injurious to the subject is a part of the law, and therefore within the maxim "*actus legis nemini facit injuriam.*" Thus, though it is a general rule that the grantee of the next presentation to a benefice must exercise his right on the then next avoidance, or lose it altogether, yet where after such a grant the incumbent was made a bishop, so that the right to the next presentation vested in the crown by its prerogative, it was held that the grantee should not lose his turn altogether, but should present to the next vacancy; for the king's prerogative to present being neither a right of patronage or of eviction, nor a usurpation, but a contingent casual right arising by act of law on a particular event, did not supply, but only suspended the turn of the patron to present till the next vacancy occasioned by the death or resignation of the king's presentee; and to take away the right of one patron to the next presentation, whilst the right of a succeeding patron was left entire, would be rank injustice, and contrary to the maxim "*actus legis nemini facit injuriam.*"⁴ The performance of a condition is excused by the operation of an act of the law which is necessary and inevitable. Thus where a condition on a feoffment of

¹ *Wallace v. Cook*, 5 Esp. 117; *Lepard v. Vernon*, 2 Ves. & B. 53.

² *Tate v. Hilbert*, 2 Ves. J. 118.

³ *Rodgers v. Ladbroke*, 1 Bing. 93.

⁴ See *Calland v. Troward*, 2 H. Bla. 324; affirmed on error in *K. B. 6 T. R. 439*; *Dom. Proc. id.* 778; 8 Bro. Parl. Cas. 71, Appendix; *Grocers' Company v. Backhouse*, 2 W. Bla. 770, 774. If inconvenience to the public arises from the act of the law, as by descent in borough English of a right to stallage and pickage to the younger son, and of a right to the market only to the elder, the difficulty created by this act of the law must be dealt with by the courts as well as they can. The distinction herein between the act of law and of parties has been recognised from *Wild's case*, 8 Rep. 78 b, downwards. See per *Littledale J. Rex v. Starkey*, 7 Ad. & E. 107; and see *Ognel's case*, 4 Coke, 49.

land was, that feoffee should pay so much *out of the profits* annually to charitable uses, and the feoffee died leaving the heir in ward to the king, the payment was excused, for the profits were transferred by act of law to the king;¹ but a condition may be apportioned by act of law; as if a man lease two acres, one of the nature of borough English, the other at common law, on condition, and dies having two sons, each may enter into his acre on breach of the condition.²

If one of two defendants arrested on a joint execution is discharged by operation of law, viz. under the lords' act, that fact will not operate as a discharge of the other; for the discharge of the former took place not with the *actual* assent of the plaintiff, but merely because he would not detain him in prison at his own expense, by allowing him sixpence a day, provided by 37 Geo. III. c. 85,³ and the act of the law in discharge shall not work detriment to the plaintiff.

If a rent-charge was granted in fee to a party to whom the land charged afterwards descended as heir of the grantor, the rent is extinguished by an act of law, so that no action of debt would lie against the executors of the latter for arrears incurred in his life.⁴

The rule "*actus Dei nemini facit injuriam*" admits of various exceptions.⁵ For its full operation over wrongs, whether committed by or against a deceased, is controlled by the maxim "*actio personalis moritur cum personâ*," of which we shall hazard this paraphrase. "The right to such personal action as in its nature, or *necessarily* in its form of pleading, is independent of contract, dies with the person of either of the parties."

The principle of the common law was, that if the declaration imputed a tort done either to the person or property of another, for which uncertain damages only could be recovered

¹ Com. Dig. tit. Condition (L. 13); 1 Ro. Abr. tit. id. (H.) p. 451, pl. 30, and (K), p. 452.

² Co. Lit. 215 a; Dyer, 309.

³ See 32 Geo. 2, c. 28, s. 13, amended 37 Geo. 3, c. 85; *Nadin v. Battle* and another, 5 East, 147; also *Moore*, 459; *Hobart*, 60.

⁴ Year Book, 45 Edw. 3, tit. Executors, 71; cited *Ognel's case*, 4 Co. 49 a; see 4 M. & S. 113; 3 Br. & B. 130; 2 Saund. 304, n. (8); 8 An. c. 14, s. 4.

⁵ See per Treby, C. J., *Kinsey v. Hayward*, 1 Ld. Ray. 482.

in satisfaction, and the plea must be "not guilty," the action died with the person *by* or *to* whom the wrong was done,¹ and the maxim is always understood of a tort,² at least in actions brought *against* an executor.³

So that while any contract, whether simple or by specialty, made *by* or with a person deceased might at all times be enforced in assumpsit or debt *by* his personal representatives,⁴ at least if his personal estate was rendered less beneficial by the breach of it,⁵ or *against* them,⁶ the death of either party puts an end to all remedy for the consequences of an injury, whether done by the deceased to the person of another, or by another person to him in his lifetime, if not of a complexion adequate to support a criminal prosecution in the latter case against some one still in being; and that this remains the rule⁷ is proved by the few exceptions introduced by the legislature at remote intervals, by which remedies are given to personal representatives for injuries to the personal, and latterly to the real as well as personal, estate of a deceased.

Thus, since stats. 4 Edw. III. c. 7, 25 Edw. III. c. 5, and 13 Edw. III. c. 11, if such direct injury is done to the personal estate of a deceased in his lifetime, that it becomes less beneficial to his executors or administrators, or to the executors of his executors, an equitable construction of those acts has given them such remedy at law as the deceased himself might have

¹ 1 Wms. Saund. 216a, n. (1); *Hambly v. Trott*, Cowp. 371; and Buller's argument, 372.

² Per Willes, C. J., *Sollers v. Lawrence*, Willes' R. 421.

³ 1 Wms. Saund. 5th ed. 216 b, n. (a).

⁴ See per Cur. *Raymond v. Fitch*, 5 Tyr. 994; 3 Bac. Ab. tit. Executors (P) 2; 1 Wms. Saund. 217, n.; *Le Mason v. Dixon*, W. Jo. 174; *Latch*. 167; Poph. 139, S. C. In *Marshall v. Broadhurst*, 1 Tyr. 348; 1 C. & J. 403, S. C. A man who had agreed to build a wooden gallery for a public dinner died before he began it. His representatives built it with the materials he had provided, and were permitted to recover its price. For this was a contract of a nature which might well be completed by others, *ibid.*; *Quick v. Ludbarrow*, 3 Bulst. 30; cited by Parke B. in *Siboni v. Kirkman*, T. & Gr. 783; 1 M. & W. 419, S. C.; and his assets might have been made responsible for damages if not performed. And see *Corner v. Shew*, 3 M. & W. 350.

⁵ 1 Wms. Saund. 216 b, note (a); *Chamberlain v. Williamson*, 2 M. & Sel. 408; see 5 Tyr. 997.

⁶ See note 4.

⁷ See 3d Report of Common Law Commissioners, 17, 74.

had, whatever might be the form of action;¹ viz. whether trespass de bonis asportatis, trover, case, debt,² ejectment for ouster of testator from the residue of his term,³ account,⁴ quare impedit for disturbance in testator's life, debt for not setting out his tithe, case for false return, case or debt for escape, &c. on final process, debt on judgment, case for removing goods taken in execution without paying a year's rent due to testator, covenant for breaches of covenants for quiet enjoyment by eviction, or against cutting trees, &c. if the damages occurred in testator's lifetime.⁵ The damage to the personal assets need not appear on the declaration, where the benefit of a contract broken during the lifetime of a deceased person would, if it were yet unbroken, pass to the executor as part of the personal estate, particularly where such contract is under seal.⁶

If goods are pawned as a security for a loan in any manner unaffected by the pawnbrokers' acts (*e. g.* at five per cent. or less), and without fixing any time for their redemption, the intention of the parties is plainly in ease of the pledger, so that he may redeem at any time during his own life, though after the death of the pawnee, for the absolute ownership remains in the pledger;⁷ whereas, if he dies without having redeemed, the words and intention of the bailment agree in making the property absolute in the pawnee, or, as it seems,

¹ *Chamberlain v. Williamson*, 2 M. & S. 408; *Le Mason v. Dixon*, ubi supra; *Emerson v. Emerson*, 1 Ventr. 187; *Smith v. Colgay*, Cro. Eliz. 384; *Wilson v. Knubley*, 7 East, 134.

² 3 Bac. Ab. 98; *Knights v. Quarles*, 2 Br. & Bing. 102; *Kinsay v. Heyward*, Ld. Ray. 433.

³ *Doe d. Shore v. Porter*, 3 T. R. 13; *Year Books*, 17 Edw. 3, 7 H. 4, 6, 73; 11 H. 4, 54; *Slade's case*, 4 Rep. 95; 1 Ventr. 30; Cro. El. 377; *Popham*, 189; *W. Jones*, 175; *S. C. Noy*, 87; *Russell v. Pratt*, cited 1 Anderson, 242; 1 Leonard, 204; *Brook's Abr. Executors*, 45, 106.

⁴ Stat. West. 2, 13 Edw. 3, st. 1, c. 23; 4 & 5 Ann. c. 16, s. 27.

⁵ See *Lucy v. Levington*, 2 Lev. 26, and 5 Tyr. R. 991, note (a); *Raymond v. Fitch*, 5 Tyr. 985, and cases collected in *Frazer's note to Pinchon's case*, 9 Coke, 89; 3 Bac. Ab. 98; also *Kingdon v. Nottle*, 1 M. & S. 355; 4 id. 53; *King v. Jones*, 5 Taunt. 418; 1 Marsh. 107, S. C.

⁶ Per cur. *Raymond v. Fitch*, 5 Tyr. 997; *Chamberlain v. Williamson*, ubi sup. being cited.

⁷ Bac. Ab. tit. Bailment (B); Com. Dig. tit. Mortgage (B); per Treby, C. J., Ld. Ray. 437; 1 Ves. 278. As to the pawnor having his life to redeem in, see *Cromwell's case*, 2 Co. Rep. 69.

in his representatives.¹ In equity, however, the pawnor's representatives have been permitted to redeem after his death.² And if a time is fixed for redeeming a pledge, the death of the pledger does not prevent his executors from redeeming within the time.³

Again, as there was no more remedy at common law by personal representatives of a deceased for injuries done to his freehold property, than there was or is now for many injuries done to his person, and his representatives could not sue *at all*, *e. g.* for assault and battery, false imprisonment, slander, deceit, diverting water, obstructing lights, cutting trees, or other like actions, where the cause of action is a tort, or supposed to be by force and *contra pacem*, or where the plea must be not guilty,⁴ and the remedies for such wrongs still died with the party injured,⁵ it has been provided by 3 & 4 W. IV. c. 42, s. 2, that for such injuries *ex delicto* to *real* estate as are committed within six calendar months before the owner's death, and for which he might have sued had he lived, his representatives may now sue in trespass or case within *one* year after his death; the damages, when recovered, to be part of his personal estate.⁶

Personal sufferings of a deceased, resulting from unskilfulness of medical attendants, imprisonment by negligence of an attorney, &c. or from mental affliction on breach of promise to marry, afford no cause of action to the personal representative, unless direct special damage can be averred, which, if recovered, would have formed part of the personal assets.⁷ If a passenger dies from the overturning of a coach, though his executor could not recover for breach of a contract to carry

¹ 1 Ves. 278; *Ratcliff v. Davis*, Yelverton, 178; *Jones on Bailments*, edit. 1833, 85, note.

² *Demandray v. Metcalf*, Prec. Chanc. 420; S. C. 2 Vern. 691; *Vanderzee v. Willes*, 3 Bro. Ch. R. 21.

³ *Bulstrode*, 29.

⁴ *Hambly v. Trott*, Cowp. 375, and cases collected *Frazer's* note; 9 Co. 89 a.

⁵ *Le Mason v. Dixon*, Latch. 168; S. C. Sir W. Jones, 174; *Emerson v. Emerson*, 1 Vent. 187; 1 Saund. 217, 218, notes.

⁶ See *Bacon v. Smith*, 1 Ad. & E. (N. S.) 345.

⁷ *Chamberlain v. Williamson*, 2 M. & Sel. 408; see 5 Tyr. 989, 997; 2 C. M. & R. 588, S. C.; 1 Wms. Saund. 216 b, note. See *Howard v. Crowther*, 8 M. & W. 661; *Williams on Executors*, 2d edit. 68; per Parke, B., in *Beckham v. Drake*, 8 M. & W. 854.

safely, it seems he might for the expense of attempting a cure.¹

As to remedies *against* the personal representatives of a deceased, who in his lifetime has been guilty of a public or private tort, viz. of a misfeasance or malfeasance to the person or property of another without gain to himself, as assault, libel, adultery, &c. and for which a cause of action would have arisen against him *ex delicto* only, to which not guilty was a proper plea, the maxim "*actio personalis moritur*," &c. applies, and these wrongs are buried with the offender.²

Thus, an executor is not liable in trover for conversion by testator,³ for escape suffered by him in his capacity of sheriff,⁴ or for not completing a work of individual skill or taste undertaken by him, *e. g.* a book, a painting, a piece of sculpture, a lighthouse, &c. or involving his personal risk,⁵ or for his libel,⁶ or for damages in dower, where the dowress died before they were assessed by writ of inquiry.⁷

However, by 3 & 4 W. IV. c. 42, s. 2, an action of trespass or on the case is given against an executor or administrator for any wrong committed *by* a deceased within six calendar months before his death to another, in respect of his property real or personal. Such action must be brought within six calendar months after the defendant's taking on him the administration. The personal representative of an executor, whether of right or *de son tort*, was not liable at common law for the devastavit of the deceased executor, but is now made so by 30 C. II. c. 7, and 4 & 5 W. & M. c. 24, except in the case of an executor *de son tort* of a similar executor.⁸

Again; executors, &c. are liable in replevin or detinue, if

¹ Follett *arguendo*, 5 Tyr. 987.

² Cowp. 375; 5 Tyr. 994; 7 Ad. & E. 429; 3 Bla. C. 302. As to Forest Law herein, 4 Inst. 315.

³ Hambly v. Trott, Cowp. 371. See Sir W. Jones, 173; Palmer, 330; notwithstanding Saville, 40, Ca. 90.

⁴ Perkinson v. Gilford, Cro. Car. 540, and cases collected Williams on Executors, 2d edit. 1230.

⁵ Per Bayley, B., Marshall v. Broadhurst, 1 Tyr. 850; 1 C. & J. S. C. Parke, B. in Siboni v. Kirkman, 1 M. & W. 419; T. & Gr. 783, S. C.; Wentworth v. Cock, 10 Ad. & E. 44, 45, and authorities there cited.

⁶ Ireland v. Champneys, 4 Taunt. 884.

⁷ Mordant v. Thorold, 1 Salk. 252; Carth. 133; cited 2 M. & Sel. 413; and Benson v. Flower, Sir W. Jones, 215.

⁸ Hammond v. Gatliffe, Andr. R. 252; Bac. Ab. tit. Executors, F. 2, 3.

goods taken by the deceased remain in specie after his death,¹ or for money had and received, if conversion and sale by him has benefited his estate.² So in assumpsit, if a carrier dies before performing a contract to carry goods;³ or in debt, if a deceased sheriff has not paid over money levied by him under a *fi. fa.*, for that was neglect of duty or nonfeazance.⁴ If a deceased has for more than six months before his death raised and sold the coal of another, trespass lies against his personal representative, under 3 & 4 W. IV. c. 42, s. 2, for what was raised within six months before his death, and assumpsit for money had and received for the produce before that time: for as the acts of trespass were distinct, the remedies are compatible.⁵

The maxims "*Impotentia excusat legem*,"⁶ "*Lex neminem [or non] cogit ad impossibilia*,"⁷ or "*ad vana seu inutilia peragenda*,"⁸ and "*Lex non cogit inutile*,"⁹ are in *pari materia* with the above, and must accordingly receive a brief illustration, with this paraphrase: "Inability excuses a man from a duty cast on him by law, and not by his own covenant. The law compels no man to attempt impossibilities or to do vain or useless things."

If a man dies seised in fee of an advowson or rent, and leaving issue a married daughter having children, her death before the rent becomes due or the church void, will not prevent her husband from being tenant by the curtesy; for though she had but a seisin in law he could by no industry attain to another, and "*impotentia excusat legem*."¹⁰

The effect of the condition of a bond being impossible at the time of making it, *e. g.* a condition to go from St. Peter's at Westminster to St. Peter's at Rome in three hours, is, that the obligation stands good and the condition is void.¹¹

Though an incumbent ought to reside in his parsonage-house and not elsewhere, even in the same parish, the want

¹ *Le Mason v. Dixon*, *ubi sup.*

² *Hambly v. Trott*, *Cowp.* 376.

³ *Ibid.*; *Powell v. Layton*, 2 New R. 370.

⁴ *Perkinson v. Gilford*, *Cro. C.* 540; *W. Jo.* 430; *S. C. Adair v. Shaw*, 1 Sch. & Lef. 265; *Earl Shrewsbury's case*, 3 Bac. Ab. 98; 1 Wms. Saund. 5th edit. 216 a, note.

⁵ *Powell v. Reep*, 7 Ad. & E. 429.

⁶ *Year Book*, 40 Edw. 3, 6 a, relied on 1 Co. 98; 8 Co. 73 a; *Hobart*, 96.

⁷ *Year Book*, 42 Edw. 3, 5; *Hardres*, 387; *Noy's Max.* 46; 2 *Ld. Ray.* 1164.

⁸ 5 Co. 21 a.

⁹ *Roll. Abr. Condition (C.)*

¹⁰ *Co. Lit.* 29 a.

¹¹ *Co. Litt.* 206, a, b.

of a parsonage-house or lawful imprisonment without covin, form exceptions to the rule by construction of law, for "*impotentia excusat legem*."¹

If a deed must remain in one court it may be pleaded in another without profert, for *lex non cogit ad impossibilia*.²

The law compels no man to show that which by intendment he does not know; as if a servant is bound to serve his master in all "lawful commands," it is a good plea to say he served him faithfully.³

A party who by his own act puts it out of his power to perform his covenant breaks it.⁴ Thus, where Sir Antony Main let for twenty-one years to Scot by deed, covenanting to grant a new lease at any time during Scot's life on surrendering the old one, but levied a fine, afterwards granting to the conusee (a third person) for eighty years, Sir Antony was held to have broken his covenant; for though Scot had not surrendered, which he was bound to do as the first act, Sir Antony had disabled himself to accept the old, or make a new lease, and the law will not compel any thing to be done, *e. g.* the surrender to be tendered, if it will be vain and fruitless.⁵

If a lease is made for forty years on condition that lessee dwells the whole time on the lands, his death at the end of ten years renders the condition impossible, and his executors shall enjoy the land.⁶

If a bond is conditioned to appear next term in such a court, and before the day obligor dies, the bond is saved.⁷

The "impossibility" meant by the maxim is not that which arises from want of power in a party to do what he has contracted for; as if he unguardedly contracts to furnish an increasing quantity of corn every week, which, from inattention to the rules of arithmetical progression, is so large a quantity as to be nearly impossible to furnish;⁸ but equity will relieve, treating it as a "catching bargain."⁹

R. P. T.

¹ Butler and Goodale's case, 6 Co. 21 b.

² Co. Lit. 231 b.

³ Noy's Max. 46.

⁴ Noy's Max. 46.

⁵ 5 Co. 20 b; Co. Entries, 244, pl. 6; Moor, 452; Cro. EL. 449, 479; Poph. 109; 2 And. 18; Jenkins's Cent. 256; and see Rol. Abr. tit. Condition (C).

⁶ Dodd. 37 Eliz.

⁷ Noy's Max. 47.

⁸ Thornborow v. Whitaker, Ld. Ray. 1164; 6 Mod. 305; 3 Saik. 97; James v. Morgan, 1 Levinz, 111.

⁹ See 1 Ventris, 267; 1 Wils. 295.

ART. V.—STARKIE'S LAW OF EVIDENCE.

A Practical Treatise of the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings. Third Edition, with very considerable Alterations and Additions, embracing all the Cases published to the end of the year 1841. By Thomas Starkie, Esq., one of her Majesty's Counsel. 1842.

" To the Editor of the Jurist.

" Sir,

" Feb. 5, 1842.

" You will greatly oblige me by publishing in your valuable work the following communication.

Your's, very faithfully,

" J. STARKIE."

" My attention has been drawn to an uncandid and unfair article in the last number of the Law Magazine, which professes to be a criticism on my *forthcoming* edition of the Law of Evidence. It is *uncandid*, because it imputes the omission of many cases which have been published whilst the work has been going through the press, and which could not be systematically arranged, except by means of an appendix; advantage is thus taken of the publication of part of the work previous to the appendix, for charging the negligent omission of cases, which could not be inserted in the body of the work. *Unfair*, because the writer untruly alleges the omission of several cases which are actually contained in the work.

" It is very far from my intention to enter into any discussion with the writer of this article, but, to the profession some explanation is due. Owing to the great accumulation of authorities and statutes relating to the subject, subsequently to the last preceding edition, and also to my own professional engagements, the present edition has been in the press between two and three years, a period much longer than I had anticipated; and, consequently, numerous authorities published during the printing of the work, have necessarily been reserved for the appendix, in which they are already arranged under the same heads, in the same order, and with constant reference to the very pages of the original text—a course adopted in the second edition. I hope that this course will not be of serious inconvenience to any one who may be disposed to consult the book; and trust that the profession will *suspend their judgment* on the work, until the whole shall have been submitted to their consideration."

The profession have taken Mr. Starkie at his word, and have suspended alike their judgments and their orders.

Whether, when they come to exercise the one, they will increase the other, remains to be proved. The work is now completed; by its intrinsic qualities it must rise or fall.

We readily forgive the discourteous epithets bestowed on our former article, in the letter we have placed at the head of this; since a popular author, full of fame and years, becomes, like an eastern prince, so familiar with the accents of flattery, as to be naturally startled at the language of censure. Reflection, however, should have suggested to Mr. Starkie the policy, if not the justice, of silence. By speaking of our want of candour, he has imprudently furnished an expression, which the public may possibly apply to an author who, while in March, 1842, he himself alludes to his *forthcoming* edition, allows his publishers, in December, 1841, to announce in the papers of the day its *then* publication, and who permits them further to insert, in the very number of the Law Magazine which contained our article, the following advertisement:—

“Just published, by V. & R. Stevens and G. S. Norton, &c.

“**STARKIE'S LAW OF EVIDENCE.** Third Edition. In 3 vols. royal 8vo. price £4 : 14s. 6d. boards.

“A Practical Treatise of the Law of Evidence, and Digest of Proofs in Civil and Criminal Proceedings. Third Edition, with very considerable Alterations and Additions, *including all the Cases published to the end of 1841.* By Thomas Starkie, Esq., Barrister at Law, one of her Majesty's Counsel.”

Feeling, too, as he *must* have done, that our charges of negligence were amply supported by the passages we cited, it should have occurred to him, that some purchaser might by chance stumble on the first page of his third volume, and, vexed at having given nearly £5 for what he afterwards discovered to be of little practical value, might console himself by reading aloud, that “negligence may be regarded as a species of fraud, being a breach of some undertaking either express or implied.”

But the question still remains, do we deserve to be called “uncandid and unfair?” If the not believing that nearly three years were necessary to pass the work through the press, or the not anticipating (as probably Mr. Starkie himself did not anticipate till after the publication of our article) a supplemental volume of 361 pages, were either or both suffi-

cient to establish a want of candour, then, by our own free confession, we are the most uncandid of men. We imagined that Diligence might have corrected the sheets as carefully in twelve months as in twelve years, and that Sloth herself could not have been occupied more than eighteen months in such an employment. Mr. Starkie appears to have originally entertained the same opinion, since he confesses that "the period (between two and three years) was much longer than he had anticipated;" but perhaps he, like ourselves, did not make sufficient allowance for his "professional engagements." However that may be, we can scarcely deserve blame for not having been possessed of a spirit of divination, and consequently for not having shaped our observations to meet a most improbable state of facts. On the subject of the Addenda we would add a word. We knew, indeed, that a long one had been appended to the second edition; but we also knew that it had been received with such general disapprobation by the profession, that we could not believe Mr. Starkie would again have recourse to so clumsy and slovenly an experiment, and tempt the patience of the public by making the second half as long again as the first. Our readers will now decide whether, when the work was published in December, 1841, we were not amply justified in condemning the omission of cases, many of which were decided in 1839, and all, with four exceptions, before the summer circuit of 1840. Of these four, three were decided in the Michaelmas Term following, and judgment in the remaining case¹ was pronounced by the Court of Exchequer in the April of last year.

The charge of unfairness will scarce detain us a moment. Mr. Starkie says, we "have untruly alleged the omission of several cases which are actually contained in the work." If this were so, the author would have but himself to thank, since, by publishing his book without an index or a list of cases, he made it utterly impossible, except by looking every time through every page, to ascertain with certainty whether a case was really omitted or not. But we did not undertake to assert that any cases were not in the work. We merely

¹ Doe d. Parsons v. Heather, 8 M. & Wels. 158.

pointed out the heads where they should properly have been introduced, and we said they were omitted there. We say so still. The list of cases is now published, and will test our correctness. We complained of the omission of fifty-six. Ten of these are noticed in the work; but out of that number, three¹ are cited on points wholly different from those for which we required their authority; three more² are to be found in notes where no one would think of looking for them; and the remaining four³ are placed under heads far less suitable than those under which we expected to find them. If, in speaking of Mr. Starkie's Index, we were to complain, that under the titles "Testimony" and "Evidence," no reference is given to that part of his work where the general character of direct parol evidence is discussed, would it be *fair* to charge us with *unfairness*, because, had we studied the Index from beginning to end, we *might* have found the proper reference under the head "Human Testimony?"

Having said thus much in self-defence, we hasten to make a few further observations on the work itself, and in doing so we shall endeavour to preserve a strict impartiality. The task is sufficiently distasteful, since to blame is invidious, to praise impossible.

The more closely we examine the present edition, the more evident does it appear that Mr. Starkie has either grievously overrated his own powers, or wholly miscalculated the difficulties with which he had to contend. Ten years have elapsed since the second edition appeared, and within this period very many statutes have been passed, and numberless cases decided which have altered and modified the old system of law to a vast extent. To introduce into a work so voluminous as the one before us, a systematic and connected summary of the modern improvements, and to strike out all those passages which such improvements have rendered incorrect or unimportant, so that the book might present a clear view of the existing state of the law, and be one on whose authority the

¹ Robinson v. Ferriday, Sainsbury v. Matthews, and Wills v. Langridge.

² Boys v. Ancell, Wagstaffe v. Sharpe, and Abercrombie v. Hickman.

³ Bowman v. Willis, Lawson v. Langley, Nowell v. Davies, and Bayntun v. Cattle.

practitioner might with safety rely, demanded a combination of energy, skill, research, and toil, little, if at all, inferior to that required for the composition of the original treatise. But Mr. Starkie is no longer a young man; and length of days, while it brings experience and sometimes discretion, but too surely damps the energy and diminishes the vigour of early life. We doubt much whether he possessed the strength requisite for the task he undertook, and cannot be surprised that his attempt has failed. It is only in the fictitious narrative of the poet, that the aged hero can draw the bow which strained the muscles of his manhood.

Had Mr. Starkie confined his labours to the first volume, and given an undivided attention to the improvement of his masterly disquisition on the general principles of Evidence, he would have bestowed on the public a gift worthy of his well-earned fame. The work would have been studied by every member of the profession. The theorist, no less than the practical man, would have opened it with avidity, have perused it with profit and pleasure, and have closed it with regret. Is it not most vexatious to reflect, that none of these consequences will now result, since the author, by grasping at the shadow, has lost the substance, and by striving to make the whole complete, has left every part full of error and confusion?

Thus, at p. 4, vol. 1, we read, in utter contempt of the stat. 6 Geo. IV. c. 50, s. 60, that "if the jury in a civil proceeding wilfully misapply the law, they do it at the risk and peril of an attaint." And at pages 528 and 531, the same error is repeated for a second and a third time. At p. 80 of the same volume, we find the stat. 53 Geo. III. (no chapter is mentioned, but we presume c. 71 is intended) cited as the act which now governs the costs of witnesses in election petitions; though that stat. was repealed no less than thirteen years ago by 9 Geo. IV. c. 22, which in its turn was suspended, first by 2 & 3 Vict. c. 38, and again, on the repeal of that act, by 4 & 5 Vict. c. 58,¹ on the 89th and 92nd sections of which last-named act, the present law is founded.

¹ Continued until 31st of July, 1843, and to the end of the then session, by 5 & 6 Vict. c. 73.

Again, at p. 422, the following passage is inserted :

" In civil, and *now* also in *some* criminal cases (*a*), the party, in addition to the evidence which he adduces (the *probatio inartificialis* of the Roman law), is entitled to the aid of the comments and arguments of counsel, the *probatio artificialis*, as applied to the evidence in general."

" (*a*) i. e. in all cases of misdemeanour, and also cases of treason within the stat. 7 Will. 3, c. 3, s. 1."

It is certainly not very flattering to Mr. Starkie's accuracy, to say, as we have heard it said by his *friends*, that these errors are not blemishes, being too gross to mislead any student who has eaten a Term of dinners in the Inner Temple Hall, or drawn three non-assumpsits in Mr. Chitty's Chambers. Now, without pausing to question the soundness of this reasoning, we confess, that in our own opinion, glaring mistakes, like those we have cited, are of real advantage to the work. They are the beacons which warn us of the hidden rocks. They teach us to think, and examine, and doubt, as we read, and not to take all the author tells us for granted. Perchance, it was with this intention they were left. Thus, by their aid we discover that no reliance is to be placed on such paragraphs as the following, p. 320 :

" Where a witness is likely to be abroad at the time of the trial, the party who requires his testimony may move the Court in term time, or apply to a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse*, before one of the judges of the Court, if he reside in town, or if in the country, or abroad, before commissioners specially appointed, and *approved of by the opposite party, whose consent is essential*. The Court, in furtherance of the application, where it is necessary, will put off the trial at the instance of the defendant, if the plaintiff will not consent ; and if the defendant refuse, the Court will not give him judgment as in case of a nonsuit. Where a witness was unable from illness to attend the trial, and was not likely to recover, leave was refused to examine him upon interrogatories, as to his attestation of a deed, although it was sworn that the defendant had at one time admitted the execution of the deed ; and the Court also refused to dispense with the attendance of the witness upon the trial on such grounds. *Jones v. Brewer*, 4 Taunt. 46."

We would not advise our readers to cite the case of *Jones v. Brewer*, as a binding authority in the present day ; or to be

quite sure, since the passing of the stat. 1 Will. IV. c. 22, that, in applying for a rule to examine witnesses on interrogatories, "the consent of the opposite party is essential."

So also the knowledge that signal blunders *may* be found in the work will lead us to mistrust the following passage, p. 528 :

"If the judge admit the matter to be evidence, but not conclusive, when in point of law it is conclusive, the course is to demur to the evidence (t), because (as it is said), although the evidence be conclusive, the jury may hazard an attain if they please (u); as when the judge leaves it to the jury whether the probate of a will be evidence to prove the devise of a term of years (w).

"(t) See Demurrer to Evidence, *infra* 467. [Mistake for 530.]

"(u) T. Raym., 104, 5 [mistake for 405]; T. Jon. 146.

"(w) See Tidd's P. 773, 4th edit.." [Published in 1808. The work has reached a 9th edition.]

On referring to the case cited from Raymond, which is *Chichester v. Phillips*, it will be seen that its meaning is wholly misinterpreted in the text, and that it is not quite so absurd as it is there made to appear.

Yet, notwithstanding all the defects of the first volume, it is still a useful and interesting work. Being a treatise on general principles, it is calculated for the closet rather than for the court; for patient study than for hasty reference. If, then, the student will read it with cautious *distrust*, and examine all such authorities as are cited with sufficient correctness to admit of their being found, he will certainly derive much benefit and some pleasure from the perusal. He will, indeed, occasionally meet with sentences which he does not understand, such as this at p. 320: "A deposition between any parties is evidence to contradict a witness, but it is not evidence to support the testimony of a witness." The six authorities appended in the note will here afford him no assistance, as on referring to them, he will find that they are all misquoted.

So, again, he will sometimes be amused with the ponderous common-places which the author loves to introduce, and will probably think that the passage we have cited below, from p. 431, is no inapt specimen of "much ado about nothing."

"Now, considering that all human affairs and dealings are connected together by innumerable links and circumstances, forming one vast context, without any chasm or interruption, and undistin-

guished by the artificial boundaries and definitions of right and wrong prescribed by the law, it is in the nature of things impossible that a transaction detailed upon the record can be identical with the one proved, if the proof vary in the slightest particular, be it in its own nature ever so insignificant."

In five words, "things different are not identical."

In examining the references collected in the notes, we would advise the student to regard this part of the work as written in an Oriental language, and to read *backwards*. He will thus frequently be saved much useless trouble, as the statute or case cited in the last line or two of the note often overrules all the authorities that precede it. Thus at p. 83, note (*t*), by referring to 6 Geo. IV., c. 16, he will find that a string of statutes, quoted immediately before that act, as giving power to commissioners of bankrupts to enforce the attendance of witnesses, have been repealed. At pp. 84 and 85, note (*d*), by turning to 7 Geo. IV., c. 64, he will discover that it is mere waste of time to examine the statutes 18 Geo. III., c. 19, and 58 Geo. III., c. 70, though several sections of those repealed acts are set out at length, as now governing the expenses of prosecutions in cases of felony; and, not to multiply examples, he will find the same advice highly serviceable in reading note (*r*), in the substituted page, 159, note (*g*), p. 507, note (*b*), p. 243, and a multitude of other notes, which we have not space to enumerate. We would also venture to suggest that the student should skip that part of the volume which treats of variances; for Mr. Starkie himself has furnished the most cogent argument in support of this advice, by declaring, at p. 500, that "some matters are excluded from the consideration of the jury, on account of their *general tendency to mislead*, and to create prejudice rather than to promote the cause of truth."

We have said that the first volume, if read with sufficient distrust, may be studied with profit, but we fear that justice will not permit us to extend to the remainder of the work even this scanty praise. The second and third volumes are confined to illustrations of the proofs requisite to support particular issues, and are intended to form a book of reference in the hurry of actual business, and amid the noise and bustle of a court. The information required from them is neither

historical nor philosophical, but merely practical; unless, therefore, this information relates to the existing law, and reliance can be placed on its general correctness, no prudent man will take the trouble so much as to cut the pages. We shall presently see how far in these respects the last part of the work is entitled to the confidence of the public. We will suppose that instructions are sent to counsel to advise upon evidence in an action of *debt*; it becomes necessary to ascertain what evidence is admissible under the plea of *nunquam indebitatus*. Mr. Starkie's work is opened at "Rules of Court;" we have seen in our former article with what success. Foiled in his first attempt, counsel next turns to the head "Debt," p. 369; he there finds two pages filled with a very elaborate discussion of the evidence that *was* admissible under the old plea of *nil debet*, and amongst other important matter he discovers that "the *plaintiff* might give in evidence under this plea, any matter which showed that nothing was due at the time when the action was brought; as payment, or a release." Reading on in despair, he comes to the new rules, which he finds copied verbatim from p. 985, but not a comment nor a case to explain their operation. The addenda is searched; under head "Rules," he finds two cases which relate to the general issue by statute,¹ one of which is repeated at p. 1488, under head "Not Guilty;" and the title "Debt," p. 1396, furnishes him with four cases, of which, one² is of very doubtful authority, three are decisions of more than six years' standing, and all relate to the effect of the plea of payment.

If the action were on the *case* the result would be the same. Mr. Starkie, at p. 300, discusses at length the effect of "Not Guilty" before the New Rules, and sets out the authorities on that subject with painful minuteness; but when he comes to explain the existing law, he is quite content, as in treating of *debt*, with copying the New Rules from p. 985, and citing in the corresponding page of the addenda two cases, which throw no light whatever on the admission of evidence under the present plea of "Not Guilty." This last instance is the more remarkable, as p. 300 is substituted for a cancel.

¹ See 5 & 6 Vict. c. 97.

² *Macintosh v. Weiller*, 1 Moo. and Rob. 504.

In the original work, published last December, the cancelled page was worded in the present tense, thus; "the defendant *may* under the general issue," &c., "The excepted defences *are*," &c.; but after our observations had drawn the attention of the public to Mr. Starkie's neglect of the New Rules, he seems to have thought that some alteration must be made; yet, determining that it should cost as little trouble, and afford as little information, as possible, he allows the passage to appear in its new dress, with the simple change of the past for the present tense. Whether the profession will be satisfied with such an apology for a correction, we know not; but unless we greatly err, they will think that the whole passage, both in its original and altered form, affords about as much practical information as if the author had inserted an interesting quotation from the *Ta tsing leu lee*, or the *Manava-Dherma-Sàstra*.

Perhaps the best method that the legal reader can adopt for testing the value of the work before us, is to consider how a non-legal treatise, prepared in the same form, would be estimated by the public. For instance, if the subject were a political and statistical account of Great Britain in the year 1842, and the author, proposing to give no historical information, but a mere summary of the present government, the present population, and the present resources of the empire, were to announce in the text, whether in the past or the present tense, that the House of Commons contained 513 English, 45 Scotch, and 100 Irish members, in all 658, out of which 306 were returned by 162 persons; that Old Sarum and Gatton returned two members each, while Birmingham and Manchester returned none; that Guadeloupe, Martinique, and Le Guyane belonged to the British Crown; that Great Britain contained a population of twelve millions; and that the annual expenditure of the country was about £78,000,000; while the notes referred to De Lolme, 1st edition, Porter's Tables, 1st and 2d part, Annual Register for year 1813, and the census of 1811;—would the student be satisfied, though the work should at length declare in general terms, that "*nous avons changé tout cela*," and each note should close, in the true Starkiean form, with these ominous words, "*But now see the Reform Bill, the Treaties*

of Peace at Paris, May, 1814, Nov. 1815, the Census of 1831, the Census of 1841, the last nine volumes of Porter, and Parliamentary papers and returns, *passim*!" Would he not rather exclaim, as he threw down the book in disgust, "Why these are the very subjects we expected to find detailed at length, and they are despatched in four lines!"

If we turn from civil to crown cases, the utility of the work is questionable to at least an equal degree. A bill is found against a party, charging him with making signals to smuggling vessels, or being armed for the purpose of smuggling. The counsel for the prosecution is anxious to discover what proofs are necessary to establish his guilt. He opens this "Digest of Proofs in Criminal Proceedings," and seeks for the head "Smuggling." There is no such title. He examines the index and is equally unsuccessful. He turns to the list of statutes, and looks for the act of 3 & 4 Will. IV. c. 53, which contains the law relating to offences against the Customs. A single reference points to the p. 1522 in the Addenda, but this has nothing to do with the matter.

If the charge is one of highway robbery, he finds no such head; the act of 7 Will. IV., and 1 Vict. c. 87, which defines the offences of robbery and stealing from the person, is wholly omitted, and two cases only are cited at p. 1564 of the Addenda, which bear upon the fourth section.

In like manner, at pp. 691-2, under the head "Malicious Injuries Indictments for," many cases are cited, and among them two, *R. v. Withers* and *R. v. Lancaster*, without any reference, in order to show what wounds constituted a cutting within Lord Ellenborough's act, though the statutes 9 Geo. IV., c. 31, and 7 Will. IV., and 1 Vict. c. 85, by inserting the word "wound" in their corresponding enactments, have rendered these decisions utterly valueless. At p. 692, note (*j*) Marshall's case is said "to differ most essentially from that of *R. v. Fox*, above cited, p. 783." It does not appear by the Table of Cases to have been cited at all. In the next page reference is made to p. 441, in which a totally different subject is treated. Macdermot's case is quoted as MS., though reported in *R. & R.* 356; and the following passage is inserted with reference to the crime of procuring abortion:—"Upon an indictment for administering a noxious substance

to a woman quick with child, with intent to procure abortion, it is essential to prove that she was quick with child at the time." and neither here nor in the Addenda is any notice taken of 7 Will. IV., and 1 Vict. c. 85, s. 6, which, by omitting the words "quick with child," has rendered both the allegation and proof of that fact unnecessary. Mr. Starkie proceeds:—"But where the indictment charged the prisoner with administering a decoction of savin (describing it to be a noxious substance) to a woman with child, but not quick with child, it was held to be unnecessary to prove that the substance so administered was savin, or that it was capable of procuring a miscarriage, or *that the woman was with child*; these being unnecessary averments." In support of this proposition he cites Goldsmith's case, 3 Camp. 73, although so much of the judgment of Mr. Justice Lawrence in that case as is cited above in italics, was distinctly overruled by all the judges in Scudder's case, 3 C. & P. 605, and 1 M. C. C. 216. Then follow several cases on the Black Act, which have no bearing whatever on the present law, as settled by the statutes 7 & 8 Geo. IV. c. 30, ss. 16 and 25, and 7 Will. IV. and 1 Vict. c. 90, s. 2.

The next head is "Mandamus," which in a work upon evidence we scarcely expected to find. We certainly were not prepared to see it treated in the following cavalier manner. "As to a mandamus to justices to set out facts in a conviction, see *R. v. Wilson*, 1 A. & E. 627. As to a traverse of a return, see 1 A. & E. 297." The page last referred to has nothing to do with traversing a return. In the corresponding page of the Addenda, 1480, the same title affords this further information—"Is not grantable until the proceedings on the first record are complete; *Rex v. Baldwin*, 8 Ad. & Ell. 947, and 4 Per. & Dav. 124." Four lines are thus given to elucidate one of the most difficult branches of the law. The first gives little information, the second gives none, and the last two are nonsense.

Again, in a voluminous work upon evidence, wherein the several subjects of registers, births, marriages, and deaths are discussed at much length, we have a right to expect the insertion of at least so much of the late registry act as enacts, that "all certified copies of entries purporting to be sealed

with the seal of the general register office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy shall be of any force which is not so sealed." We should also be justified in looking with confidence for some notice of the act of 7 Will. IV. & 1 Vict. c. 22, which by sect. 8 enacts, that the registrar general may direct that the *place* of birth or death of any person registered under the former act shall be added to the entry, and shall constitute to all intents a part of the original register; and, making all due allowances for occasional inattention, we might fairly calculate on finding a copious extract from the important act passed in 1840, which enables courts of justice to admit non-parochial registers as evidence of births or baptisms, deaths or burials, and marriages. Had the author inserted a list of the registers which have been made evidence under this statute, he would only have done what it was his duty to do, and the obtaining such a list would have cost him no further trouble than that of turning to the last volume of Messrs. Carrington and Payne's reports. But, in examining the Digest before us, we find the first act dismissed in the following valuable note. "(a) See the provisions of the recent stat. 6 & 7 Will. IV. c. 86." The second is totally omitted, and the third is thus noticed in the Appendix, p. 609.—"As to non-parochial registers made evidence, and the mode of giving those registers and extracts from them in evidence, in the courts of common law, and at the sessions, and *the places of deposit of the registers of the Jews, the India registers, and the registers of British embassies and factories abroad*, see 3 & 4 Vict. c. 92." The act in question points out the mode of proceeding to be adopted in courts of equity as well as in courts of law, though Mr. Starkie would seem to confine its operation to the latter; and it is scarcely credible, though no less true, that it does not contain a single syllable respecting any of the matters we have printed above in italics.

The whole title of marriage is deplorably inaccurate. Thus, at p. 699, the text informs us that "where the marriage has been solemnized in a chapel, evidence should be given that banns have been usually published there previous to the marriage act;" and reference is made to Lord Hardwicke's Act,

which was repealed nineteen years ago. Note (o) in the following page points out the mode of proof adopted in *Taunton v. Wybourn*, 2 Camp. 297. Then at p. 701 we are told that "where the marriage was by licence, and either of the parties, not being a widower or widow, was a minor, *it is essential* to prove the consent of the father," guardian, or mother; and an instance is then given in the following page of a prisoner's acquittal on a charge of bigamy for want of such proof. In support of this proposition the act of 26 Geo. II. c. 33, is again cited, while a note in the same page states correctly "that a marriage by a minor by licence, without the consent of his father then living, was held to be valid" in *R. v. Birmingham*, 8 B. & C. 29, and the act of 4 Geo. IV. c. 76, is noticed. The laws of different periods are thus jumbled together; sometimes one act is mentioned as "*The Marriage Act*," sometimes another; no practical information whatever can be obtained, and on a subject which a little common sense, a little industry, and a little arrangement might have rendered perfectly clear, the reader, like the author, is lost in bewilderment.

But to continue our examination of this title, at p. 703, Mr. Starkie thus proceeds:—"A marriage *may be* avoided by evidence of the incapacity of either of the parties to the contract, either by reason of consanguinity *or affinity*;" and a note appended to this paragraph states that "by the 5 & 6 Will. IV. c. 54, marriages within the prohibited degrees of consanguinity or affinity, thereafter celebrated, are to be void." If the text is intended to apply to marriages celebrated since the 31st August, 1835, when the act of William IV. was passed, it is obviously contradicted by that act, which renders such marriages not voidable but void; if to marriages solemnized before that date, it is equally incorrect, since these marriages, though within the prohibited degrees of affinity, cannot now be annulled for that cause.

In this dilemma of blunders we leave the author, while we turn to p. 198, head *Bastardy*. We there find no notice whatever of the act of William IV., but the law is thus erroneously expounded. "It is held, that although the wife was precontracted, or within the prohibited degrees of consanguinity or affinity, yet if she be not afterwards divorced, the issue

will not be bastards ; and after the death of the parties the marriage cannot be drawn into question to bastardize the issue." So also, at p. 895, where the subject of Polygamy is treated, the confusion respecting the consent of parents in marriages of minors by licence, of which we complained while discussing the head Marriage, is no longer apparent. All is here plain ; there is no conflicting authority, no ambiguity, no confusion ; but unfortunately all is wrong. We learn that, " Where one of the parties was a minor at the time of the marriage by licence, proof of the consent of the parent, guardian, &c. according to the marriage act, was required to be proved." A long note refers to four cases which establish this point, and not so much as a hint is suggested that they have been all overruled. The title closes, in consistent inutility, with extracts from the long since repealed statute of 1 Jac. I. c. 11, and with comments and cases explanatory of its meaning.

Under head " Husband and Wife," we find, at p. 546, that " the husband is not liable, as upon an implied assumpsit, to maintain his wife's children by a former husband ;" and again, " the husband may maintain an action for the amount of necessaries, on an express assumpsit by such child made after he has attained his age ;" and neither here nor in the corresponding page of the Addenda is any reference made to the New Poor Law Act, which in sect. 57 enacts, that the husband shall be liable to maintain the antenuptial children of his wife, whether legitimate or not. In the next page Mr. Starkie thus continues :—" The husband may, it seems, in answer to an action of assumpsit, on an agreement to allow the plaintiff 12s. a week for the use of the wife, prove the adultery under the general issue without a special plea." He refers to *Scholey v. Goodman*, 1 Bing. 349, in which the point was not decided, and which could not, under any circumstances, be a present authority for the proposition in the text, as it was reported long previous to the new rules. Indeed it is clear that such a defence must be specially pleaded.

The head " Friendly Society," p. 498, is no honourable exception to the general inaccuracy of the work. The 13th section of the statute 33 Geo. III. c. 54, is cited in the text as governing the reception in evidence of the rules and regulations of these societies, though that act was repealed in the

year 1829, while a note refers to two other acts which have also been repealed, but wholly omits the important act of 4 & 5 Will. IV. c. 40.

In our former article we censured in general terms the title "Game," which in the alphabetical order immediately follows the last-named head; but we refer to it again with the view of pointing out a curious passage which then escaped our attention. At pp. 503-4, we read that

"With a view to costs (*h*), it is frequently necessary to prove, as alleged, that the trespass was wilful and malicious, or that the defendant is an inferior tradesman (*i*), apprentice (not being in company with his master, duly qualified), or dissolute person (*k*).

"(*h*) Under the statute 4 & 5 Will. 3, c. 23, s. 10, which in case of a wilful trespass, by such person coming on the land to hunt hares, &c. gives the plaintiff full costs of suit. The statute 1 & 2 Will. 4, c. 32, s. 46, declares it shall not preclude actions of trespass for damages under former acts.

"(*i*) It would not be easy to frame words more ambiguous and indefinite than those which are used in the making of this statute. In the case of *Buxton v. Mingay*, 2 Wils. 70, the judges were divided upon the question, whether a surgeon and apothecary, not being qualified to kill game, came within these words. See Com. 26.

"(*k*) In *Pallant v. Roll*, 2 Bl. R. 900, it was held, that a huntsman going out with the hounds of his master (a qualified person) by his order, was not a dissolute person. In *Mr. Christian's G. L.*, Lord Ellenborough is reported to have said that he should direct the jury to find that the defendant was a dissolute person, if he came to kill game for the purpose of selling it; or if he was drunk or abusive; or if, being questioned where he lived, or what was his name, he gave a false account of himself."

Mr. Starkie evidently considers this passage of importance since the Index refers to it thus,

"Inferior Tradesman,
proof of being, ii. 504."

These grave doubts, whether surgeons are inferior tradesmen, and huntsmen dissolute fellows, are highly edifying; and old Judge Doddridge, who used to say that "a cry of hounds had to his sense more spirit and vivacity than any other," would, doubtless, have felt excessive interest in resolving the second; but it is melancholy to reflect that these highly important questions can no longer arise, since the statute 1 & 2 Will. IV. c. 32, has cruelly repealed the old law of Will. III., and has not, as Mr. Starkie asserts it has,

left it open to parties to prosecute "actions of trespass for damages under former acts."

In these instances, and in a multitude of similar passages, Mr. Starkie appears to have relied upon the legal maxim, "utile per inutile non vitiatur;" but if so, he has deplorably misunderstood its meaning. The farmer indeed may allow the tares and the wheat to grow together until the harvest, lest an unskilful hand, by gathering up the one may root up the other also; but his conduct bears no analogy to the legal writer who blends in one common narrative the exploded law of yesterday and the acknowledged law of to-day. The tares may impoverish the soil, and choke the growth of the wheat; yet they can never be mistaken for corn, and at the harvest they can be separated with ease by the reaper; while the commingling of good and bad law not only encumbers with useless matter the work itself, but of necessity must mislead the student who consults it; since he, who has sufficient knowledge to detect the errors, requires not to study the parts which are correct.

It may be, and doubtless is, galling to the parental feelings of a writer, to strike from his work elaborate passages which have cost him much thought, and exhibit much learning; it is painful for him to reflect that so much research has been rendered useless by modern improvement, and to be compelled to unlearn in his old age the lessons which have cost him so dear in his youth; it is doubly painful for the accredited teacher, to become, at the eleventh hour, again a pupil. All this is very vexatious; but unless he will consent to bear these annoyances, no man should undertake to re-edit a work on a fluctuating and progressive system of law. The author who wishes to shift the burden of thinking from his own shoulders to those of his readers, will find that the latter are as idle as himself; and if he cannot, or will not, afford them information on which they can rely, they will naturally turn to those who are both willing and able to satisfy their inquiries.

It now only remains for us to bestow a few words on the Addenda; we have already incidentally mentioned it in our preceding observations, but Mr. Starkie appears to value so highly this part of the work that, we imagine, he would scarcely be satisfied if it were refused a separate notice. We

will commence with the cancels : in number they are nine, of which six, ("fas est et ab hoste doceri,") were directly, and one was indirectly, occasioned by our former strictures. Now, the author's attention having been especially drawn to these passages, one might reasonably expect that, here at least, he would have taken some trifling pains to be accurate, and yet there are few parts of the work which exhibit more striking marks of negligence. We have already seen the slovenly manner in which the nominal alterations under the head "Case" have been effected. Let us take another example from the substituted page 159, which treats of inhabitants : the cancelled page, in connection with several others, contained a long discussion of cases and statutes rendered nugatory by the late act of Victoria, which was passed to remove all doubts as to the competency of rated inhabitants as witnesses. We condemned the entire passage as useless, but, with a view of illustrating the general inaccuracy of the work, we remarked that the cases of *Oxenden v. Palmer*, and *R. v. Bishop Auckland*, were cited as binding authorities, though, independently of the late statute, they had both been in fact overruled. Mr. Starkie now reprints the page verbatim, with these additional lines in a note : "And in the later cases of *Doe d. Boulthbee v. Adderley*, and *Doe v. Bowles*, 8 Ad. & Ell. 502, the case of *Oxenden v. Palmer* was overruled, and that of *Meredith v. Gilpin* supported. And now see the statute 3 & 4 Vict. c. 26, infra, 161." At the corresponding page of the Addenda, 598, the substance of this addition is again repeated, the cases of *Doe v. Adderley* and *Doe v. Bowles* being cited by way of variety from *Neville & Perry* instead of *Adolphus & Ellis*. Then at page 596 of the Addenda, the very case of *Oxenden v. Palmer*, though acknowledged to be overruled in two parts of the work, is quoted as supporting the *Nisi Prius* decision of *Fowler v. Port*, 7 C. & P. 792, which is cited at length as a binding authority, unless indeed it be shaken by the act of Victoria, which is noticed in the last line in the usual "But see" form. Nor is this all, for at page 1412 of the Addenda, this unfortunate case is for a fourth time noticed in the following manner :

"In an action by overseers to recover parish lands, held that a rated inhabitant was a competent witness. (Per Alderson, B.), *Doe*

v. Cockell, 6 C. & P. 526; *supporting* Oxenden v. Palmer, 2 B. & Ad. 236 : *contrà*, Heudibourck v. Langston, and Rex v. Hayman, 1 M. & M. 401 ; and now see the late stat. *supra*, vol. i. p. 159."

This is certainly a remarkable paragraph ; first, it is not stated whether the witness was for the plaintiff or defendant ; secondly, Doe v. Cockell, so far from supporting, contradicts Oxenden v. Palmer ; thirdly, it supports Heudibourck v. Langston and Rex v. Hayman, and is not opposed to those cases ; fourthly, all four decisions have become utterly worthless since the act of Victoria was passed ; and lastly, the page in the 1st volume to which reference is made does not set out one word of that act. Then as to the case of R. v. Bishop Auckland, it still appears, at the substituted page 159, to be a valid decision ; and lest any doubt on the subject should afford the student a chance of being right, it is a second time referred to at page 530, 2nd vol., in support of the following sentence ; " A party rated to the highway rates is *not* rendered a competent witness on an indictment for not repairing a highway, such not being 'a matter relating to the rates or cesses' within the 54 Geo. 3, c. 170." The case is here quoted from Mo. & Rob., and, as usual, the reference is wrong. We have cited these passages at length, as we think they afford a specimen of curious blundering, to which it would indeed be difficult to find a parallel.

Again, at *new* page 337, it is still asserted, that " a man's voluntary affidavit is admissible against himself," but " a copy of a voluntary affidavit is not admissible in evidence," though all voluntary affidavits have been abolished by the act of 5 & 6 Will. IV. c. 62, s. 13, and in the next page the obsolete law of protestations is discussed with much learned comment, the only difference between the cancelled and the substituted pages being, that in the first the discussion related to the present, and in the second to the past tense. Then at *new* page 282, we find a sentence which savours somewhat of the laws of our ancestors. " If a burglar in one county convey the goods into another county, where he is convicted of larceny, he *may be ousted of his clergy* by proof of the burglary in the former county." Some instructive observations on " bye-laws" immediately follow, to which we would beg the attention of our readers.

So also at p. 449 of the original work, Foster v. Blakelock

was cited as deciding that proof of the stamp on a probate was evidence of assets. We disputed this doctrine, and in consequence the page has been cancelled, and the case now appears as a mere authority that such proof is *admissible* evidence. In the Addenda, p. 1417, the probate stamp is admitted not to be *sufficient* evidence, nor even *prima facie* evidence of assets, and yet at p. 1035, 3d vol., we find this passage is allowed to remain without a comment.

"A probate stamp is, it has been held, *prima facie* evidence against an executor of the receipt of assets to an amount covered by the stamp (r)."

(r) "*Foster v. Blakelocke*, 5 B. & C. 328."

We cannot forbear quoting the next two lines of the note: "As to the duty on legacies in India, see *A. G. v. Sir C. Cockerell*, 1 Price, 165." Mr. Starkie is ignorant, or at least he is determined his readers should be ignorant, that this case has been overruled, first by *Jackson v. Forbes*, 2 Cro. & Jer. 382, affirmed in Dom. Proc., 8 Bligh, 15, and 2 Cl. & Fi. 48, and again in *Arnold v. Arnold*, 2 Myl. & Cr. 256, by the late Lord Chancellor.

We will give but one more example from the *new* pages. At p. 809, in support of a proposition that the plaintiff in assumpsit may sue a dormant partner of the defendant as a co-defendant, the following note was originally inserted: "*Lloyd v. Archbowle*, 2 Taunt. 324; *Ruppell v. Roberts*, 4 N. & M. 31. The rule however does not extend to an express written contract, formally made between the parties: *Beckham v. Knight*, 4 Bing. N. C. 243. For an express contract excludes mere presumption." This page has been cancelled, and the note now appears in this form:

"*Lloyd v. Archbowle*, 2 Taunt. 324; *Ruppell v. Roberts*, 4 N. & M. 31; *Beckham v. Drake*, Exc. Mich. T. 1841, overruling *Beckham v. Knight*, 1 Scott, N. S. 675, 4 Bing. N. C. 243."

The case of *Beckham v. Knight*, instead of being overruled by the Court of Exchequer, was affirmed in the Exchequer Chamber, see 1 M. & Gr. 738; and in *Beckham v. Drake* that case was not so much as cited, and the question there decided had no possible reference to it. The facts were these. In the original case of *Beckham v. Knight and Drake*, the

Court of Common Pleas decided in favour of the defendants, on the point of law stated in the original note; in the Exchequer Chamber the judgment was affirmed on technical pleading grounds, but the judges intimated an opinion that the premises, on which the Court below relied, were erroneous. A second action was brought on this intimation, and another line of defence was adopted, and it was upon this, and this only, that the Court of Exchequer pronounced their judgment. See the case reported in 8 M. & Wels. p. 846. The decision of the Court of Exchequer Chamber is not mentioned in Mr. Starkie's work.

Coming now to what may be strictly called "*the Addenda*," we feel some difficulty in knowing how to describe it. We cannot presume to say in what manner it was prepared, but we may assert thus much, that if Mr. Starkie had purchased the last three numbers of Jeremy's Annual Digest, and a sharp pair of scissors, and giving both to his clerk, had desired him to use the one in cutting the other into strips, he might have produced a work in many respects similar, in most superior, to the volume which he has published. A total absence of all useful comment, of all judicious selection, of all sound discrimination, would have been apparent in the clerk's as in the master's performance. We should have found reduced "*in unum volumen*" the "*multa inania et frivola*," mentioned by Lord Bacon, but we should at least have been spared the "*antiquæ fabulæ*," which now try alike our patience and our temper in such passages as these:

App. 1324. "Amerciament. *Seemle*, it may be by a jury without other affeerment, per Holt C. J., *Mathews v. Cary*, Show. 61; Com. Dig. Leet, (O 2).

"Indemnity. As to the effect of incapacitation, see *Rex v. Parry*, 14 East, 549.

"Mine. May be followed, when, 2 Vent. 342.

"Officer. See Com. Dig. tit. Officer, (D 2); 3 Mod. 150, as to a ministerial officer's appointing a deputy," &c. &c.

The cases too would have been cited from *all* the reporters who had published them, and the volumes of Adolphus & Ellis, Bingham, Manning & Grainger, and Meeson & Welsby, would at least, have been quoted as frequently as those of Nevile & Perry, Gale & Davison, Scott, and Dowling; and

besides this we doubt if the references would not have been greatly more correct, and the language have proved far more grammatical. It certainly requires more ingenuity than we possess to extract any precise meaning from such sentences as the following :—

593. Appendix. "A witness attending an arbitration who stays to wait the event of an application to the court in consequence of a revocation of the submission and want of pecuniary means of returning, is not privileged from arrest; *Spencer v. Newton*, 5 Ad. & Ell. 818." [This case is really reported in 6 Ad. & Ell. 623.]

1315. App. "The statement of an accomplice in sheep stealing was corroborated by the fact of great quantities of mutton being found in the prisoner's father's house, where he lived, and as stated by the accomplice, is a sufficient corroboration; *R. v. Birkett*, 8 C. & P. 732."

We must here remark, that numerous cases are cited in the Addenda, which have already been inserted in the body of the work. In the few examples we shall give it will be seen what advantage is derivable from this repetition, and generally what reliance can be placed on the authorities as quoted. Thus, at vol. 1, p. 113, vol. 3, p. 1185, and Ad. p. 1590, (being the corresponding page to 1185,) *Hodson v. Marshall* is noticed at length, and in all these places is cited as a case to which the act of 3 & 4 Will. IV. c. 27, s. 42, was *held* not to apply; but at p. 129, vol. 1, it is again quoted, with this dubious comment, "but note that the learned judge gave no opinion on the operation of the statute, and the plaintiff elected to be nonsuited." So *Shepherd v. Wheeble* is cited at p. 1038 with a quære, and in the corresponding page of the Addenda as correct law. *Horner v. Graves* appears at p. 66, vol. 2, as a binding authority, and at p. 351 as overruled; and at p. 86, vol. 1, the expenses of medical witnesses attending on coroners' inquests are said to be regulated by 6 & 7 Will. IV. c. 89, and 1 Vict. c. 68, while at p. 592, Add. to 1st vol. the act of Will. IV. is alone mentioned. In these, and the like cases, Mr. Starkie may enjoy the rare felicity of being quoted with encomiums on both sides, and counsel may support antagonist propositions by the single weight of his authority; magno se jndice quisque tuetur. On the whole it will probably be thought that Mr. Starkie's

publishers have formed a more correct estimate than himself of the merits of the Addenda, and that they have pretty fairly stated its real value in printing on the title-page "delivered GRATIS."

Our task is now done. Examples of negligence and error, equally remarkable with those we have cited, still crowd upon us, and with perfect ease we might swell this article by their insertion, till it became quite as bulky and almost as dull as the Addenda itself; but we abstain from making further extracts: those we have furnished are amply sufficient to put the public on their guard, and to establish, at least, a *primâ facie* case against the author. If any member of the profession requires more conclusive evidence, let him *borrow* the work and test it for himself.

We must now take our final leave of Mr. Starkie. We have been reluctantly compelled, as it were in self-defence, to write this second article upon his Treatise. We have been charged with unfairness, and with a want of candour. We feel that these charges are undeserved; and the best means of proving them to be so is by again referring to the work which called forth our original criticism. Towards Mr. Starkie himself we have not, nor can we have, any hostile feeling. We admire his talents, we respect his character, but we are forced with regret to pronounce that his last labours have done him no credit. Still his reputation, as an author, does not depend upon those labours, but happily rests upon a far surer foundation. The genius of Milton will be acknowledged as long as his country's language is understood, in spite of his *Paradise Regained*. The fame of Shakspeare will be immortal, though perchance he lent his name to the miserable play of *Pericles*; and Mr. Starkie will long be regarded with admiring gratitude by the legal profession, notwithstanding the third edition of his Treatise upon Evidence.

J. P. T.

ART. VI.—THE ANGLO-SAXON LAWS.

1. *Ancient Laws and Institutes of England, comprising Laws enacted under the Anglo-Saxon Kings, from Æthelbirht to Cnut, with an English Translation of the Saxon ; the Laws called Edward the Confessor's ; the Laws of William the Conqueror, and those ascribed to Henry I. Also, Monumenta Ecclesiastica Anglicana, from the Seventh to the Tenth Century ; and the ancient Latin Version of the Anglo-Saxon Laws. With a compendious Glossary.*—Printed by Command of his late Majesty King William IV., under the direction of the Commissioners of the Public Records of the Kingdom. Fol. 1840.
2. *The Rise and Progress of the English Commonwealth—Anglo-Saxon Period ; containing the Anglo-Saxon Polity, and the Institutions arising out of Laws and Usages which prevailed before the Conquest.* By Francis Palgrave, F.R.S. 4to. London.

THIS edition of the "Ancient Laws and Institutes of England," like that of the Institutes of Wales noticed in our last number, each being produced under a different editorship, forms part of the late Mr. Petrie's work, of "Materials for the History of Britain," the publication of which was undertaken by the government as early as the year 1822. Of this project nothing has publicly appeared, excepting the above-mentioned works. With whom the faults of delay rest, it is not necessary at the present time to inquire ; and we may now dismiss the subject, with the single remark, that a bookseller, relieved from risk of loss, would assuredly have effected much more in twenty years, than appears to have been done by the government in this matter.

The written memorials of Anglo-Saxon Law which have been handed down to us, so far as they are already known, enable us to form a far less complete and satisfactory view of the Anglo-Saxon people, than the Welsh laws do of the ancient Britons. All writers on the subject agree that these memorials are but fragments, and that even were they perfect, they would have been wholly insufficient in themselves to have provided for the general administration of the Anglo-Saxon law and polity.

"In adopting the indefinite title of 'Ancient Laws and Institutes of England,'" says the learned editor of the present edition, "I have been influenced by the consideration, that what we now possess of Anglo-Saxon law is but a portion of what once existed, and therefore without claim to the title of *The Anglo-Saxon Laws*, which has usually been bestowed on it. Of the laws and kindred documents no longer extant, the names of some, together with fragments worked into other codes, have been transmitted to us; such as the Mercian Laws of Offa, from which Alfred, in framing his body of laws, selected such portions as were suitable to his purpose; the South Anglian Laws, the *Frið-gewritu*, &c. At the same time, we ought not, perhaps, to suppose that among our Saxon forefathers, any more than among ourselves, there ever existed a complete *corpus juris Anglici*, but that theirs was also a customary or common law; and that what we still possess, and also the portion that has perished, were either the records of decisions to serve as precedents for the future, or enactments passed in the *Witena-gemóts*, for the repeal, confirmation, amendment, or completion of the law as it then stood.

"Whence," the editor proceeds to ask, "did the earlier of these institutes originate? If brought by our forefathers from their German home, we ought apparently to give them credit for a degree of civilization beyond that usually ascribed to them. Their original institutes were, however, but scanty, consisting probably in little beyond that portion of the laws of Ethelbert which contains the penalties for wounds and other bodily injuries; and which, with such modifications as time, place, and other circumstances may have produced, were common to all the kindred nations of northern Germany. It is moreover observable, that the nations nearest of kin to the Angles and Saxons, in this chapter coincide with them the most closely. Besides the portion brought over by the Saxons, Angles, Jutes, and perhaps Frisians, and the records of adjudged cases or sentences passed, the church, from the earliest period, furnished its full portion to the codes of our simple forefathers; and the first enactment of the first Christian king being, that for the property of God and of the church (if stolen), twelvefold compensation be made. If,

therefore, from all the laws before us, we extract all re-enactments and all matters purely ecclesiastical, all cases recorded as precedents for the future, probably immediately after their decision, and all exhortatory matter, the remainder will probably consist of the few primitive institutes by which the various tribes were ruled before their establishment in this country."

The ancient British laws were those of a people in a very primitive state of barbarism, almost unaffected by contact with other nations. The Anglo-Saxons, on the contrary, were far from being the aborigines of our island; and though they may have brought the most essential parts of their laws and customs from their own northern homes, it cannot be doubted that their whole polity, as it now appears to us, must have been materially modified by that of their predecessors. Before the Anglo-Saxons had invaded Britain, the original inhabitants of the country existed for a long time under the dominion of the Romans. When the Saxons came to our shores, they found Roman law and Roman authority. There can be no doubt, therefore, that a thorough investigation of the Anglo-Saxon law, would show that it, like Anglo-Saxon architecture and the arts in general, had been most sensibly affected by Roman influence.¹

¹ The Venerable Bede describes the compilation of the laws of King Æthelbirht—the earliest known Saxon laws existing—as made after the example of the Romans:—"Rex Aedelberct . . . qui inter cætera bona, quæ genti suæ consulendo conferebat, etiam decreta illi judiciorum juxta exempla Romanorum, cum consilio sapientium constituit."—*Hist. Eccl.* ii. 5.

Not so much in proof of what is said, but for its own interest, and as *apropos* of the general subject, we quote the following remarks, which appear in the recent very interesting edition of the Anglo-Saxon Charters, published by the English Historical Society. (*Codex Diplomaticus Ævi Saxonici. Opera Johannis M. Kemble.*)

"One important fact we have in evidence, namely, that nuncupative wills, permitted by the Romans only under peculiar circumstances of difficulty, were easily allowed of by the Anglo-Saxons. A son having laid claim to some lands in his mother's possession, and impleaded her before the county court, a deputation was despatched to receive her answer: in a feeling of pardonable irritation she formally disinherited him, and constituted a kinswoman then present her sole legatee, in the following remarkable words:—'Her sit Leóðfild mīn mæge, Ʒe ic ge-ann æg Ʒer ge mīnes landes, ge mīnes goldes, ge hrægles, ge reafes, ge calles Ʒe ic āh, æfter mīnon dæge:—here sitteth Leóðfild my kinswoman, unto whom I grant both my land and my gold, both gown and dress, and all that I possess, after my own day.' And they, having testified to the county that these words had been spoken,

Into such an investigation, or, indeed, to one of an Antiquarian character at all, as respects the Anglo-Saxon laws, it is not our intention to enter. As Mr. Thorp reminds us in his preface, the harvest of such inquiries may be rich, but there are few to gather it.¹ We therefore propose to adopt

judgment to that effect was given in favour of Leóðfæd's husband, and a record of the judgment ordered to be made. Here there was no instrument, no intervention of notaries, no intervention of the church, for that especial purpose; and the publication or probate was enrolled at once as a judgment of the county court. What if the lady had subsequently become reconciled to her son, and wished to change the disposition of her property!

"But this very remarkable record leads us to another consideration of much importance; I mean the property which women could have in lands, and their power of devising them. In this case, the devisor was a widow, and under no protection but her own; as appears clearly enough from Leóðfæd's husband having stated himself to be the person who ought to make answer for her, if he only knew her plea. But we have other cases where lands are devised, even during the husband's life.

"These, it appears, were such lands as the husband had formally settled upon his wife, either as the price for which he bought her of her friends, or as the *morgengifu*—in other words, the *morning gift*, which it was usual to present to her on the morning after consummation. How it may have been with the former, is not very clear; but the latter endowment appears to have been strictly in the wife's power: in several wills, the husband carefully points out the lands to which his wife has this claim; and in several cases, women appeal to it as their title to lands which they are desirous of alienating. Again, in case of incontinence, the widow might be punished by forfeiture of this provision (Ll. Cnut, tit. 71); so that it appears to have been fully her own, to dispose of at her own pleasure, in addition to the settlement which was made upon her in the event of her surviving her husband (Ll. Eadmund, tit. 3), and which naturally ceased on the occasion of a second marriage."

¹ The general apathy towards any historical inquiries, deeper than the mere surface, is a disgrace to our country. "Too much ignorance prevails in England respecting the habits of our Saxon ancestors; too many of our most polished scholars have condescended to make themselves the echoes of degenerate Greeks and enervated Romans, and to forget the amphibology that lurks in the word *barbarous*, while want of power to comprehend the peculiarities of the Saxon mind—without which no one will comprehend the peculiarities of the Saxon institutions—has led others to describe the ancestors of the English nation as savages half-reclaimed, without law, morals, or religion. To this assertion it is enough to oppose the fact, that nearly all European civilization went forth from our shores, when the degraded remnants of Roman cultivation survived only to bear witness in their ruins to the crimes of the respective nations, and the punishment which the crimes of nations never yet have failed to bring down upon them. How evidently the finger of God showed itself in the irruption of the barbarians, may best be learnt from the records of Procopius, Salvianus, and other contemporary writers. In reading the accounts given by these hostile witnesses, we cannot escape from the conviction that the appointed work of the Teutons was to reinfuse life and vigour and the sanctity of a

the course we followed on a similar occasion, of merely collecting such specimens of the laws as are likely to interest the general reader, and which may be received as somewhat illustrative of the time and the character of the people among whom they obtained. To those very few, who are already acquainted with these laws, through the previous works of Wilkins and others, our article can have but little interest or novelty.

The law of the Anglo-Saxons, when they first settled in Britain, is supposed by several writers to have been entirely oral and traditionary. "It was a common law, existing as the common law of England still exists, in customs, whether local or national, recorded in the memory of the judges, and published by the practice of the tribunal." (*Rise and Progress of the English Commonwealth.*) The remains of the ancient poetry of the law, among the Anglo-Saxons, are few as compared with the ancient Britons. Among the latter the bard

lofty morality into institutions perishing through their own corruption. And the Anglo-Saxons were not the least active in fulfilling their part of this great duty.

"There is no good reason to doubt that at the period when the Teutonic tribes first attracted the attention of the south, they already possessed, more or less fully developed, the principles and germs of that system of polity, which has at length found its completion in the institutions of this country, in spite of all its changes, still of all European nations the most true to its Germanic prototype. One fact, common to the Celtic, German and Wendish tribes, appears to have interested the Roman observer, who could find no parallel to it in his own country, so much as to have caused some exaggeration in the record of its effects. The typical principle of the Roman law was 'the property or land of the individual citizen, the *ager*, bounded and defined by civil and religious ceremonies.' The typical principle, on the contrary, of the Teutonic law was 'the land held in common, in German the *gau*;' out of this, in its development or its disturbance, arose the democratic and elective, or the aristocratic and monarchical power in Europe. The Roman law considered the individual member of the state the citizen; the Teutonic law based itself upon the family bond."—(*Codex Diplomaticus Anglo-Saxonum.*)

The philological value of a knowledge of Anglo-Saxon literature to an English student cannot be over-estimated. "If we examine the most simple specimens of our written language, or that which is used in our colloquial intercourse with each other on ordinary occasions, we shall find the average Saxon words to be not less than *eight* out of *ten*; or, on the most moderate computation, *fifteen* out of *twenty*. Indeed, the learned Dr. Hicks has already observed that of *fifty-eight* words, of which the Lord's Prayer is composed, not more than *three* words are of Gallo-Norman introduction; and of those two are corruptions from the Latin, which cannot be said of the Saxon. The remaining *fifty-five* are immediately and originally derivable from the Anglo-Saxon!"—(*Dr. Ingram's Inaugural Lecture on the Utility of Anglo-Saxon Literature.*)

and the law-giver spoke to the people on very nearly the same subjects, and in very nearly the same words—words, at least, the same in spirit. No personages appear in Anglo-Saxon history corresponding to Prince Taliessin and Prince Llywarch. There is no such collection as the British Triads. Occasionally, indeed, some doctrines of law, preserved in quaint rhymes, may be quoted as we find them in the work already mentioned: “Thus the Kentishman asserted the liberty of his gavel-kind tenure by the rude distich of ‘*The vader to the boughe—and the son to the ploughe.*’ He redeemed his lands from the lord by repeating, as it was said in the language of his ancestors, ‘*Nighon sithe yeld—and nighon sithe geld—and vis pund for the were—ere he become heraldere.*’ The forest verse, ‘*Dog draw—stable stand—back berend—and bloody hand,*’ justified the verdurer in his summary execution of the offender. And in King Athelstane’s grant to the good men of Beverley, and inscribed beneath his effigy in the minster, ‘*Als fre—mak I the—as heart may think—or eigh may see,*’ we have, perhaps, the ancient form of enfranchisement or manumission.”

Distinct castes or classes existed amongst the Anglo-Saxons, like other Teutonic nations, which were fully and indisputably recognized by the law. “It was whilom, in the laws of the English, that people and law went by ranks, and then were the counsellors of the nation of worship worthy, each according to his condition, ‘*eorl and ceorl, thegen and theoden.*’”

The first great class in the Anglo-Saxon aristocracy were the chieftains or kings, all of whom claimed to inherit their *jus divinum* from Wodin. Next came the eorls or “*eorlcundmen,*” or “thane-born”—the nobles or ingenui; “and though mere nobility, that is to say, nobility unaccompanied by landed property, did not confer authority, still the main privileges of the patrician were the results of blood and parentage, and were not even suspended by the immunities of the clergy.” The ceorls, or “low-born,” composed the third class of the people. The theowes, or serfs, were not held to be part of the commonwealth.

In all warlike matters, whether conducted by civilized or barbarous men, the best man rose to the top of his class. It

was part of the Anglo-Saxon polity to recognize principles of promotion in civil affairs.

If a ceorl thrived, so that he had fully five hides of his own land, church and kitchen, bell-house and burh-gate, seat and special duty in the king's hall, then was he thenceforth of thane-right worthy.

So if a "thane" thrived, he became an "eorl." A merchant who "fared thrice over the wide sea by his own means," was worthy of thane-right. And the "scholar" also found his suitable rank in the Church.

Every man might be entitled to justice, but the justice of the ealdorman was very different in value to that of the ceorl.

Let the word of a bishop and of the king be without an oath, incontrovertible. (King, *Wihtræd*, 16.)

A mass-priest's oath and a secular thane's are in English law reckoned of equal value.

A twelf-hynde man's oath stands for six ceorls' oaths; because if a man should avenge a twelf-hynde man, he will be fully avenged on six ceorls, and his wer-gild will be six ceorls' wergilds. (Oaths, p. 78.)

The "wergild" due for the life of the earl was six-times the worth of the wergild due for the life of the ceorl. If an earl were slain, six ceorls might suffer as a recompense.

The king's "burh bryce," or breach of security, shall be cxx shillings.¹

An archbishop's, 90 shillings.

Any other bishop's and an ealdorman's, 60 shillings.

¹ "The 'weres' of the continental Saxons were fixed in 'solidi' or shillings; but the solidus was an imaginary denomination, and instead of counting down the coin, the offending party might drive his legal tender into the farm of the plaintiff. An ox passing sixteen months old represented the greater solidus; the lesser solidus was a yearling ox, or a ewe and her lamb. Amongst some Saxon tribes the solidus was reckoned in corn; thirty bushels of oats, forty of rye, and sixty of wheat, being each its equivalent."—*Rise and Progress of the English Commonwealth*.

Mr. Thorpe seems to think that the Kentish shilling contained 20 scættas, and concludes that the pound contained 250 scættas, or 12½ shillings, which would make the scætt nearly equal to a penny, and the shilling something less than an ounce of silver.

"Anomalies occur in the legal arithmetic of the Anglo-Saxons, which in its particulars is complicated and sometimes obscure, and the damages do not increase by regular intervals."—*Rise and Progress of the English Commonwealth*, p. 213.

A twelve-hynde man's, 30 shillings.

A six-hynde man's, 15 shillings.

A ceorl's edor-bryce,¹ 5 shillings.

If aught of this happen when the "fyrd" (or land force) is out, or in Lent fast, let the "bot" (or amends) be two-fold. If any one in Lent put down holy law among the people without leave, let him make "bot" with cxx shillings. (King Alfred, 40.)

If a wite theow, an Englishman, steal himself away, let him be hanged and nothing paid to his lord. (King Ina, 24.)

(5.) If a man slay another in the king's "tun,"² let him make "bot" with 50 shillings. (13.) If in an eorl's tun, 12 shillings. (King Æthelred.)

If any one with a hloth³ slay an unoffending *twy-hynde* man, let him who acknowledges the death-blow pay wer and wite, and let every one who was of the party pay xxx shillings as hloth-bot. If it be a *six-hynde* man, let every man pay lx shillings as hloth-bot, and the slayer wer and full wite. If it be a twelve-hynde man, let each of them pay 120 shillings, and the slayer wer⁴ and wite.⁵ If a hloth do this, and afterwards will deny it on oath, let them all be accused, and let them then all pay the wer in common, and all one wite, such as shall belong to the wer. (King Alfred, 29, 30, 31.)

The value of female chastity was determined by the "caste" of the maiden. "If a man lie with the king's maiden (perhaps his Hebe or cup-bearer), let him pay a 'bot' of l shillings: if she be a grinding slave, let him pay a 'bot' of xxv shillings: the third class xii shillings. (14.) If a man lie with an eorl's birele or cup-bearer, let him make 'bot' with xii shillings. (16.) With a ceorl's birele, 6 shillings; with a slave of the second class, l scætts (averaging from 15 to 19 grains of sil-

¹ "i. e. a breaking of his 'close,' coupled with a forcible entry into his place of residence."

² Mr. Thorpe conceives that "tun," like "edor," implied the area inclosed by the fence, as well as the fence; and that a ceorl's "edor" comprised not only his curtilage, but also the house attached to it.

³ Any number of men from eight inclusive to thirty-five.

⁴ The price at which every man was valued, according to his degree, which, in the event of his being slain, was to be paid to his relatives.

⁵ The mulct or fine due to the king or state.

ver); with one of the third, 30 scættis." So ordained by King Æthelred.

One class committed a rape, and made compensation in money, another in his person. If a man commit a rape upon a ceorl's female slave, let him make bot to the ceorl with 5 shillings, and let the wite be 1x shillings. If the male "theow" commit a rape upon a female "theow," let him make bot with his testicles. (King Alfred, 25.)

If a man lie with the wife of a twelve-hynde man, let him make "bot" to the husband with 120 shillings: to a six-hynde man, let him make "bot" with 100 shillings: to a "ceorlish" man, let him make "bot" with 40 shillings. (King Alfred, 10.)

If a man seize hold of the breast of a "ceorlish" woman, let him make "bot" to her with 5 shillings: if he throw her down, and do not lie with her, let him make "bot" with 10 shillings: if he lie with her, let him make "bot" with 60 shillings. If another man had before lain with her, then let the "bot" be half that. If she be charged therewith, let her clear herself with 60 hides, or forfeit half the "bot." *If this befall a woman more nobly born, let the "bot" increase according to the "wer."* (King Alfred, 11.)

The author of the "Rise and Progress" points out that we still estimate the value of the crime by the station of the parties. "The inequality of the rights of the different classes may be stigmatized as an arbitrary violation of the equity of the law; and it may be said that justice was meted out in proportion to rank and property, and not in conformity to the nature of the crime. But before we prefer the accusation let us pause and substitute the word 'damages' for the word 'were,' and we shall find that we have not entirely abandoned the reasoning of the Anglo-Saxon law, although we have narrowed its application. If a father, for instance, is under the humiliating necessity of bringing an action against the seducer of his daughter, will not the advocate of the defendant loudly expatiate on the condition of the injured female? Should she be in the humbler walks of life, will not the circumstance of her poverty be carefully proved, in order to effect a corresponding reduction in the price of her honour and her happiness?"

The graduated scale at which injuries were valued, and the recompense provided even for the most minute, are among the most prominent and curious features of the laws of the Anglo-Saxon kings. They constitute a large part of the "dooms" enacted by Æthelbert and Alfred.

"If a man be so severely wounded in the genitals that he cannot beget a child, let bot be made to him for that with 80s. shillings.

"If a man strike out another's eye, let him pay him lx shillings, and vi shillings and vi pennies, and a third part of a penny as bot. If it remain in the head, and he cannot see aught therewith, let one-third part of the bot be retained." (King Alfred, 47.)

"If a man's tongue be done out of his head by another man's deeds, that shall be like as eye-bot." (King Alfred, 52.)

"If a man's arm with the hand be entirely cut off before the elbow, let bot be made for it with lxxx shillings." (Alf. 66.)

"If the loin be maimed, there shall be lx shillings as bot; if he be pierced, let xv shillings be paid as bot; if he be pierced through, then shall there be xxx shillings as bot." (Alf. 68.)

"If a man be wounded in the shoulder, let bot be made with lxxx shillings if the man be alive." (Alf. 68.)

"If a man rupture the tendons on another's neck, and wound them so severely that he has no power of them, and nevertheless live so maltreated, let c shillings be given him as bot, unless the witan shall decree to him one juster and greater." (Alf. 77.)

"If a man strike out another's tooth in the front of his head, let him make 'bot' for it with viii shillings; if it be the canine tooth, let iv shillings be paid as 'bot.' A man's grinder is worth xv shillings." (King Alfred, 49.)

We have selected and classified the following, to bring in apposition the value of each injury—abridging the original language—and distinguishing the dooms respectively enacted by Æthelbert (Æ.) and Alfred (Al.).

A nose struck off	60s. (Al. 48)
A shank struck off near the knee	80s. (Al.)
An eye struck out	50s. (Æ. 48)
A shank broken	30s. (Al.)
A thigh pierced, 30s.; broken	30s. (Al.)
Wound in the belly, 30s.; a thorough wound, each orifice	20s. (I.)
Wound on the shoulder so that the joint-oil flow out	30s. (Al.)

Arm-shanks broken	30s. (Al.)
Thumb struck off	30s. (Al.)
A shoulder lamed	30s. (Æ. 38)
The great toe struck off	20s. (Al.)
Outward maim of the hand, if it can be healed	20s. (Al.)
If it fly off, then	40s.
A chin-bone broken	20s. (Æ. 50)
A thumb struck off	20s. (Æ. 54)
The gold or ring finger struck off	17s. (Al.)
The second toe struck off	15s. (Al.)
A broken cheek	15s. (Al.)
Arm broken above the elbow	15s. (Al.)
Shooting or fore-finger struck off	15s. (Al.)
A cloven chin-bone	12s. (Al.)
A pierced windpipe	12s. (Al.)
Middlemost finger be struck off	12s. (Al.)
Shank pierced beneath the knee	12s. (Al.)
An ear struck off	12s. (Æ. 39)
Any injury on the mouth or eye	12s. (Æ. 44)
A broken rib within the whole skin	10s. (Al.)
If the skin be broken, then	15s.
The little finger struck off	9s. (Al. 11s.) (Æ 54)
The middlemost toe struck off	9s. (Al.)
A nose pierced	9s. (Æ. 45)
An ear mutilated	6s. (Æ. 42)
A nose mutilated	6s. (Æ. 48)
A broken collar-bone	6s. (Æ. 52)
The fourth toe struck off	6s. (Al.)
The little toe struck off	5s. (Al.)
A nail struck off	5s. (Al.)
An ear pierced	3s. (Æ. 41)
For the smallest disfigurement of the face, 3s.; for the greater	6s. (Æ. 56)
A bruise	1s. (Æ. 58.)

We shall conclude our excerpts from these laws with a miscellaneous collection of "dooms," each one throwing light upon various features of the general polity of the age. We have not thought it necessary to pursue our investigations into the ecclesiastical institutes, because they do not appear to have much peculiarity which distinguishes them from other canons and decrees of the Church.

"If any one fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life. If any one fight in a minster, let him make 'bot' with one hundred and twenty shillings. If any one fight in an 'caldorman's house, or in any other distinguished 'witas,' let him make 'bot' with lx shillings, and pay a second lx shillings as 'wite.' But if he fight in a 'gafol-gelda's' house, or in a 'gebur's,' let him pay cxx shillings as 'wite,' and to the gebur vi shillings; and though it be fought on mid-field, let one hundred and twenty shillings be given as 'wite.' But if they have altercation at a feast, and one of them bear it with patience, let the other give xxx shillings as 'wite.'" (King Ina, 6.)

"A man may fight 'orwige,' (i. e. without committing war,) if he find another with his lawful wife, within closed doors, or under one covering, or with his lawfully born daughter, or with his lawfully born sister, or with his mother, who was given to his father as his lawful wife." (King Alfred, 42.)

"If a man come from afar, or a stranger go out of the highway and he then neither shout nor blow a horn, he is to be accounted a thief either to be slain or to be redeemed." (King Wihtræd, 28.)

"If a priest allow of illicit intercourse or neglect the baptism of a sick person, or be *drunk* to that degree that he cannot do it, let him abstain from his ministry until the doom of the bishop." (King Wihtræd, 6.)

Doom concerning Hot Iron and Water.

"And concerning the ordeal we enjoin by command of God, and of the archbishop and of all bishops, that no man come within the church after the fire is borne in with which the ordeal shall be heated, except the mass-priest, and him who shall go thereto. And let there be measured nine feet from the stake to the mark by the man's feet who goes thereto. But if it be water, let it heat till it low to boiling. And be the kettle of iron or of brass, of lead or of clay; and if it be a single accusation let the hand dive after the stone up to the wrist; and if it be three-fold up to the elbow. And when the ordeal is ready, then let two men go in of either side, and be they agreed that it is so hot as we before have said. And let go in an equal number of men of either side, and stand on both sides of the ordeal along the church. And let these all be fasting and abstinent from their wives on that night. And let the mass-priest sprinkle holy water over them all, and let each of them taste of the holy water, and give them all the book and the image of Christ's rood to kiss, and let no man mend the fire any longer when the hallowing is begun, but let the iron lie upon the hot embers till the last

collect ; after that let it be laid upon the Stapela, and let there be no other speaking within except that they earnestly pray to Almighty God that he make manifest what is soothest. And let him go thereto, and let his hand be enveloped, and be it postponed till after the third day whether it be foul or clean within the envelope. And he who shall break this law be the ordeal with respect to him void, and let him pay to the king cxx shillings as 'wite.'" (King Æthelstan, 7.)

Of Moneyers.

" That there be one money over all the king's dominions, and that no man mint except within port. And if the moneyer be guilty, let the hand be struck off with which he wrought that offence, and be set up on the money smithy ; but if it be an accusation and he is willing to clear himself, then let him go to the hot iron and clear the hand therewith with which he is charged that fraud to have wrought. And if at the ordeal he should be guilty, let the like be done as he is here before ordained.

" In Canterbury, VII moneyers : IV the king's, and II the bishop's, I the abbot's.

" At Rochdale III ; II the king's, and I the bishops.

At London.....VIII

At WinchesterVI

At LewesII

At HastingsI

Another at Chichester

At HamptonII

At Wareham.....II

At Exeter.....II

At Shaftesbury.....II

Else at the other burghsI"

(King Æthelstan, 14.)

" That no shield-wright cover a shield with sheep's skin ; and if he so do, let him pay xxx shillings." (King Æthelstan.)

" If a limb-maimed man who has been condemned to be forsaken and he after that live three days, after that any one who is willing to take care of sore and soul may help him with the bishop's leave." (Laws of Edward and Guthrum, 10.)

" If during her husband's life a woman lie with another man, and it become public, let her afterwards be for a worldly shame as regards herself, and let her lawful husband have all that she possessed, and let her then forfeit *both nose and ears*, and if it be a pro-

secution and the lad fail, let the bishop use his power and doom severely." (King Cnut, 54.)

The difficulties in the translation of these laws seem to be as great as those in the interpretation of the Runic inscriptions, about which every antiquary has a version of his own; thus, the inscriptions on the Runic font at Bridekirk, Cumberland, have been interpreted by various authorities already in three very different ways :—

1. "Harold made this heap and raised these stones in honour of his mother and of Mabrok."

2. "Here Eckard was converted, and to this man's example were the Danes brought."

3. "Richard he me wrought and to this form me diligently brought."

And the same inscription is now threatened with a fourth interpretation of a learned German, who discards all the readings of his predecessors.

Even the first of the "Dooms" which King Æthelbirht established in the days of Augustine is subject to a doubt :—

1. The property of God and of the Church twelvefold; a bishop's property elevenfold; a priest's property ninefold; a deacon's property sixfold; a clerk's property threefold; church frith (or infraction of the right of sanctuary given to those within the precincts of the church), twofold.

The meaning of the very first law is left to conjecture; it is supposed to allude to stolen property for which restitution is to be made in the stated proportions of its value.

In the seventh section of Æthelbirht's "Dooms," the translation is as follows :—

"If the king's ambiht (smith or laad-rinc) slay a man, let him pay a half leodgeld."

The translator questions whether it ought not to be, "If any one slay the king's official smith or guide;" which is a very different thing.

Again at section 22 of the same laws, "If a man slay another at an open grave, let him pay xx shillings and pay the whole 'leod' within xl days." Another version is, "If a man slay another, let him pay 20 shillings at the open grave."

In other respects, besides possessing a superior purity of

the text, and the translation, this edition does not materially differ from that edited by Wilkins, and printed in the year 1721. As it may be desirable, however, to show what are the principal contents of the present volume, we have prepared the following account of it.

The earliest of the Anglo-Saxon laws printed in this volume, and consequently known to exist at the present time, are the laws of King Æthelbirht, king of Kent, and baptized by Augustine, A.D. 597, and died in A.D. 616; the laws of Hlothhære and Eadric, A.D. 673 to 686; and the laws of Wihtræd, A.D. 690 to 725; all kings of Kent. The only ancient copy of these laws is in a manuscript, the *Textus Roffensis*, belonging to the dean and chapter of Rochester, which was compiled under Ernulf, bishop of Rochester, between A.D. 1115 to 1125. Though not preserved in their primitive state, Mr. Thorpe is of opinion that these laws of the Kentish kings approach more nearly to it than is generally imagined.

These laws were first published in the "*Leges Anglo-Saxonicae*," in 1721, edited by Dr. Wilkins, who, says Mr. Thorpe, "as a translator of Anglo-Saxon not unfrequently betrays an ignorance even of its first principles, that, though not unparalleled, is perfectly astounding." Speaking of these laws, Sir F. Palgrave says, "It is difficult to believe that the text of an Anglo-Norman manuscript of the twelfth century exhibits an unaltered specimen of the Anglo-Saxon of the reign of Ethelbert. The language has evidently been modernized and corrupted by successive transcriptions. Some passages are quite unintelligible, and the boldest critic would hardly venture upon conjectural emendations, for which he can obtain no collateral aid. Neither is there any proof whatever of the integrity of the text. It cannot be asserted with any degree of confidence that we have the whole of the law. Destitute of any statutory clause or enactment, it is from the title or rubric alone that we learn the name of the legislator."

Next follow the laws of Alfred, king of Wessex (871 to 901); the text is taken from a manuscript in Corpus Christi College, Cambridge:—

The Laws of Ina, King of Wessex (688 to 735).

Alfred and Guthrum's Peace.—The latter was king of the Danes and worsted in battle by Alfred; he took possession of East Anglia in 880, which he governed till his death in 891.

The Laws of King Edward the Elder who succeeded his father Alfred in 901, and died in 924.

The Laws of King Æthelstan, A.D. 925.

The Laws of King Edmund, brother of Æthelstan, A.D. 940 to 946.

The Laws of King Edgar, A.D. 959 to 975.

A document entitled "*De Hundredo tenendo*," which precedes the Laws of Edgar, is now printed for the first time from a manuscript in the library of Corpus Christi College, Cambridge.

The Laws of King Ethelred, son of Edgar, A.D. 978 to 1016.

The Laws of Cnut, King of Denmark, A.D. 1017 to 1035.

Succeeding to Canute's Laws are the "*Rectitudines Singularum Personarum*," the Saxon original of which is supposed to exist in one manuscript only at Cambridge. It is described by the editor "as presenting us with an enumeration of the several classes of persons employed on a domain, of the services to be rendered by each, and of the reciprocal duty of the lord to those engaged on his land."

The French text of the Conqueror's laws is chiefly from a valuable manuscript at Holkham, formerly the property of Sir Edward Coke, and bearing his autograph. Its defects have been supplied from a MS. in the Harleian Collection. The laws of Henry I. excerpted from the Red-Book of the Exchequer, conclude the laws.

A section has been added, consisting of Ecclesiastical Monuments—the first being the Penitential of Theodore, Archbishop of Canterbury, from A.D. 668 to 690, now first printed. The next is the Confessional and Penitential of Ecgbert, Archbishop of York, A.D. 735 to 766; a most valuable monument, not alone of our old expressive and grammatical language, but as containing some passages of curiosity, chiefly with reference to the popular superstitions of the time. Some other Ecclesiastical documents follow, viz. the Canons enacted under King Edgar; the Law of the Northumbrian Priests; Institutes of Polity, Civil and Ecclesiastical; the Canons of Ælfric; Ælfric's Pastoral Epistle.

Though the laws of the Anglo-Saxon kings pass under their respective names, the enactment of the "Dooms" was not the sole act of the monarch, but the joint decree of the king and his counsel. Thus Wihtræd, king of Kent, enacted his "dooms" in the midst of a deliberative convention of great men: there were Birhtwald, the Archbishop of Britain, Gybmund, Bishop of Rochester, and every degree of the Church of that province spoke in unison with the obedient people. There the great men decreed, with the suffrages of all these dooms.

Ina, king of the West Saxons, sought the counsel and teaching of Cenred, his father, and Hedde, his bishop, and Eorcenwold, his bishop, and all his ealdormen, and "the most distinguished witan of my people, and also with a large assembly of God's servants."

So likewise Edward the Confessor, by the counsel of his barons, caused the noble, the wise and learned in the law, to be summoned through all the counties. A picture of an Anglo-Saxon parliament, or "Witenagemot," has been so graphically (and possibly correctly) drawn by the author of the "Rise and Progress of the Anglo-Saxon Commonwealth," and is so appropriate to the subject we have thus lightly treated, that we think our readers will not object to our concluding our present notice with it.

"We will suppose ourselves placed in the hall of Edward the Confessor, he who, like his predecessors, held the state of 'King of the English—Basileus of Britain—Emperor and ruler of all the sovereigns and nations who inhabit the Island—Lord Paramount of the sceptres of the Cumbrians, the Scots, and the Britons,'—and suppose yourself to be Haco, a Norwegian stranger, introduced by an Anglo-Saxon friend, and listening to his explanations of the assembly which you behold:—

"Those persons who are sitting and standing nighest to the king, are his chief officers of state. That tall, thin, rough-looking man, is Algar, the *stallere*, whom the Franks call the constable of the host, and great as he is, I assure you, Haco, that not one of the king's horses is sent to grass without his special order. The portly nobleman, with the huge knife and wooden trencher, is Æthelmar, the *dish thane*—he carves the

meat for royalty. Hugoline, that cautious, sly-looking clerk, is the *bower thane*, or chamberlain, he keeps the keys of the king's *hoard*. You would be astonished to see the heaps of treasure in the bow vaulted chamber; and yet there is not quite so much in the hoard as there used to be. After we had driven out your countryman, the usurper, Hardacnute, and restored our darling King Edward, the true and legitimate heir of the right royal line of Cerdic, the *huscarls* of the palace still continued to collect the *danegeld* as rigidly as before; and many an honest husbandman had his house and land sold over his head, within three days after the tax became due, to pay the arrears which he had incurred. Not that our worthy king was ever a penny the better for the danegeld. Good man, he never troubles himself about money, he leaves all that charge to Hugoline. If you were to empty King Edward's purse before his face, he would not bid you stay your hand; he would only say—'Take care, friend, that you are not found out by Hugoline.' Though the king was so little benefited by the taxes, I suppose that others fared better, and the danegelt was levied as rigidly as ever—until one day, the king rose from his bed, asked Hugoline for the key, and went alone into the hoard. And when he came out again, he told us all, with looks of the utmost horror, that he had seen the foul fiend dancing upon the money-bags containing the gold, which had been wrung from his suffering people, and grinning with delight. Whether the king had really seen anything, or whether we inconsiderately took as a fact, what he intended merely as a parable, denoting his opinion of the iniquity of the taxation, I cannot tell, but from that day the danegelt was levied no more.

"Those quiet, shrewd-looking men, with shaven crowns, are Osbern, Peter, Robert, Gyso, and the rest of the clerks of the king's chapel. He who sits at the head of the bench, is Reinbaldus, the chancellor. These venerable persons have been gradually gaining more and more influence in the Witenagemot, though anciently they were only appointed for the purpose of celebrating mass and singing in the king's chapel; and Reinbaldus, the chancellor, holds merely the place of the arch-chaplain of the French kings; he is a kind of dean, the king's confessor, who takes care of the king's conscience, and

imposes very hard penances upon him when he has sinned. But for some time past, our kings have been accustomed to turn their chaplains really to good use, by employing them constantly as their writing clerks. In this capacity the most important matters of public business must pass through their hands. Hence they have much power, and a power which was totally unknown to our ancestors; and in this innovating age, their influence has been greatly increased by a fashion which our good king Edward has brought from France. He has caused a great seal to be made, on which you may see his effigy, in his imperial robes; and to all the writs or written letters, which issue in his name, an impression from that seal is appended.

“It is by such writs that our king signifies his commands. If a question of great importance is to be decided before the thanes of the shire, in a manner out of the ordinary course, it is heard before certain clerks, and others, named by the king’s writ. If a clerk is promoted to a bishopric, he must have a writ before he can be placed in his chair or throne. If you wish to obtain the king’s protection, or his “peace,” you had best obtain a writ, by which this favour is testified. For this purpose you must apply to the clerks of the chapel. Whether issued by the king’s special direction or not, the writ is often a long time in making its appearance. And suitors find, that a golden cup placed in the king’s wardrobe, or a bay stallion sent to the royal stable, has a great effect in driving the chaplain’s quill. At present, great part of our law business is cheaply, expeditiously, and equitably despatched in the ordinary folk-moots, or courts of the hundred, or of the shire, which go on regularly, by immemorial usage, without any writ or other sanction from the king. These tribunals we derive from our remotest ancestors. We had law before we had prerogative, and folk-moots long before we had kings; and in your country, Haco, they exist in great measure unimpaired. But if, from any cause whatever, these popular courts should decline amongst us, and the pleas which are now decided before them be transferred to the king’s court, it is easy to see that the whole management of the law will fall into the hands of the chancellor and his clerks, and of those whom the king may depute to administer justice in his name.

“So much for those who are about the king. With respect to the Witenagemot itself, you will observe, that it is divided into three orders or estates. The mitres and cowls of those who are nearest to the king, sufficiently point out that the ‘Lewed-Folk,’ or laymen, have yielded the place of honour to the clergy. The prelates, however, have a double right to be present, not only as teachers of the people, but as landlords. Our government, Haco, is founded upon the principle, that, in all matters concerning the commonweal, the king ought to take the advice and opinion of the principal owners of the soil. We allow only of two qualifications for a seat in this assembly: either such a station as, in itself, is an undeniable voucher for the character and respectability of the individual, or such a share of real property as may be considered a permanent security for his good behaviour. Noble birth alone, much as we respect ancient lineage, tells for nothing whatever in our English Witenagemot, if unaccompanied by the qualification of *clerkship* or property.

“You see that near the bishops and abbots are many clergy of an inferior degree. Every bishop brings with him a certain number of priests elected or selected from his own diocese. Learned clerks have told me that this is in compliance with the canon of an ancient council; and they believe that this deputation from the dioceses has in some measure contributed to shape our temporal legislature. Others think that some such councils as the Witenagenots were held even when the Romans governed this island, and built those stately towns and palaces, of which you have seen the ruins. If Bishop Aldhelm, he who was so well read in the old Roman law books, still lived, perhaps he could give you further explanations. But the history of the past is of less consequence than the business of the present day.

“The dignified clergy, as they sit in a double right, act to a certain degree in a double capacity. In all matters of general legislation, they vote with the laymen; but if business more particularly relating to the church is discussed, they retire, and settle the affairs amongst themselves. They frequently present their ‘canons’ to the king and to the secular members of the Witenagemot, for the approbation and sanction of the laity. I doubt whether such sanction is strictly necessary

for the validity of the ecclesiastical canons, but so long as a good understanding prevails between our clergy and our laity, it will not be necessary to define the exact boundaries of the temporal and ecclesiastical jurisdictions.

"Beneath the clergy, sit the lay peers and other rulers, who are bound by homage to the crown. That vacant seat belongs to Malcolm, King of the Scots, or, as some begin to call him, the King of Scotland. The wicked usurper Macbeth had possession of his throne, and of those dominions in Lothian, in respect of which the homage of the King of the Scots is more particularly rendered. Malcolm, the vassal of our King Edward, had a full right to claim the aid of his superior, and it was granted right nobly. By King Edward's command, the stout Earl Siward marched all his forces across the Tweed, with a mighty army. Macbeth had called the Northmen—your countrymen, Haco—to his aid ; but his resistance was hopeless ; he was expelled ; and Malcolm as King Edward had commanded, was restored to the inheritance of his ancestors. Malcolm ought to be here in person. When he comes up, he is escorted from shire to shire, by earls and bishops ; and at convenient distances, mansions and townships have been assigned to him, where he and his attendants may abide and rest. Yet, with all these aids, the journey is most tedious, and not unfrequently accompanied by danger ; besides which, it is not altogether safe for Malcolm to leave the wild Scots, his turbulent subjects, uncontrolled during the very long space of time—seldom so little as half-a-year—which he must pass upon the road ; Watling-street is much out of repair ; it has not had a stone laid upon it since the arrival of Hengist and Horsa ; and the top of the Roman Fosse-way is worse than the bottom of a ditch ; and, therefore, the attendance of the King of Scots is generally excused.

"The King of Cumbria, and the Kings or 'under Kings' of the Welch, sit nigh unto the King of Scots. The two latter, Blethyn and Rhivallon, have just now sworn oaths to King Edward, and given hostages, that they will be faithful to him in all things, and everywhere ready to serve him by sea and land, and that they will perform all such obligations, in respect of the country, as ever their predecessors had done to his predecessors. But the Welch are an unfaithful nation, untrue

even to themselves. Griffith, the brother of the Welch Kings, to whom they succeed, was slain by his own men, and his bloody head was sent by Earl Harold to King Edward, at London. The Welch are constantly rebelling against us; but we keep a firm hold upon them, and compel them, upon every needful occasion, to acknowledge our supremacy. To do them justice, though they rebel they are truth-tellers, and never deny the fact of their legal subjection. In their triads, as well as in their laws, they commemorate the sum paid by Wales, when their kings receive the seisin or possession of their country from the King at London. And in the very register-book of their Cathedral of Llandaff, they have recorded how Howell the Good submitted to the judgment of the Witenagemot held by Edward the Elder, the son of the Great Alfred, and was compelled to restore to Morgan-hên and his son Owen, the rich commots or lordships of Ystradwy and Ewayas, which he had appropriated to himself, contrary to conscience and equity.

“On the same bench with these vassal kings sit the great earls of the realm, distinguished by the golden collars and caps of maintenance which they wear. These marks of honour have, however, long belonged to them; for it is thus that the effigy of the venerable Aylwine of East Anglia is adorned, as you may see upon his tomb at Ramsey Minster. He who looks so fell and grim is Siward, the son of Beorn, Earl of Northumbria. The good people in the north, who give credit to all the sagas, or lying tales of your scalds, actually believe that Siward’s grandfather was a bear in the forests of Norway, and that when his father, Beorn, lifted up his uncombed locks, the two pointed shaggy ears, which he had inherited from the bear, testified the nature of his sire. Siward himself takes no pains to contradict this story. On the contrary, I rather think that he considers it as a piece of good policy to encourage any report which may add to the terror inspired by his name. He has declared that he will never die except in full armour.

“Earl Leofric of Mercia, as you see, keeps at a distance from Earl Godwin of Wessex. These noblemen are always opposed to each other; and I dread the consequences of such dissensions. Some earls rule only single shires. They ought more properly to be called aldermen;—but our old English name is becoming unfashionable; it has given way to the Danish ap-

pellation introduced under Canute, who, as I need scarcely tell you, Haco, really and truly conquered England.

"The earls thus constitute the second order of the Witan. The third and lowest order in rank, yet by no means the least in importance, is composed of the thanes, who serve the king in time of war with the swords by which they are girt, and who are therefore called the king's ministers. The thanes are all landholders; and no individual, however noble he may be, can sit amongst them, unless he is entitled to land. An East Anglian thane used to be required to possess a qualification of forty hydes, each containing from a hundred to a hundred and twenty acres. In Wessex, I believe, five hydes are sufficient; but I am not sure, for our customs vary in almost every shire. We have no books in which they are set forth; and the wisest clerk in Hampshire would be often puzzled, if you asked him what goes for law on the other side of the Avon.

"When the Witenagemot was last held at Oxford, I recollect conversing with some thanes who came from the Danish burghs, and here also may be others from the great cities of this kingdom. I understand that, in many of our ancient cities, the aldermen, lawmen, and other magistrates, exercise their authority by virtue of the lands to which their offices are annexed. I dare say they are all in the house, but the place is so dark, that at this distance I really cannot distinguish their faces. As to that mixed multitude by whom the farther part of the hall is crowded, and who can be just seen behind the Thanes, they consist, as far as I can judge, of the class of folks who come together in vast crowds at the meetings of our hundreds and our shires. It is usual, in these assemblies, that four good men and the reeve should appear from every upland or rural township; their office being to give testimony, and to perform other acts relating to the administration of justice, and also to receive the commands of their superiors. In the Witenagemot, I believe, they are seldom or never called upon to act; but they attend from ancient custom, deduced, perhaps, from the old time, when our kings were merely the aldermen of a single shire, and when the court in which they presided was merely the moot of their own little territory. And, whatever the rights or privileges of these churls might be in days of yore, I am tolerably sure of

what they are *not* in these modern times. They have no weight or influence in the enactment of any law : voices, indeed, they may have, but only for the purpose of crying out ‘*Yea, yea !*’—when the doom enacted by the advice of the Witan is proclaimed.

“Some of our old men have thought that this kind of assent is a recollection of the customs which prevailed amongst our forefathers, the old Saxons, before they quitted the forests of Germany, when, as it is said, the *Leod*, or people at large, gave their consent to the laws which the ealdormen and priests had enacted in their solemn assembly. I am not learned enough to decide this point ; it may be so ; but nothing is said thereon by Alfric, or by Alfred, or by Bede ; and now it is our principle, that he who is worth nothing in *land*, is nothing worth in public affairs, unless, as I have told you before, the place of *land* is supplied by *learning*. But Englishmen are sturdy, and not to be easily put down. I have heard strange things said about the charters granted by Athelstane to the townships of Malmsbury and Barnstaple ; and if the churls in general should ever be led to imagine that they have a *right* to be members of the Witenagemot, I should not be surprised if they were, one day or another, to pluck up heart and grace, and cry out, ‘*No, no !*’—instead of affirming, as in duty bound, what their betters have thought best for them.

“Yet you must not suppose that these rustics are excluded by any perpetual bar. It was whilom the old English law, that if a merchant crossed the sea three times at his own risk, he obtained the rank of thane. Five hydes of land possessed by the churl for three generations, if held by him, his son, and his son’s son, placed the family in the class of those who were gentle by birth and blood ; ‘*Sithcundmen*,’ as such families were then called, before King Alfred’s day ; and though such laws are connected with usages and doctrines which have become obsolete, still we retain all the spirit of our ancient lessons of freedom ; and, if qualified by station and property, there is no man between the channel and the water of Scotland who may not acquire a share in the government of our empire.

“Haco, you well know how we call this assembly ?—A ‘*Micel-getheat*,’ or Great Thought—a *Witena-gemot*, or

'Meeting of the Wise'—and at present it well deserves its name. Our *redes-men* or counsellors, the members of the legislature, ponder much before they come together, say little, and write less. All the dooms or statutes which have been enacted since the days of King Ethelbert, would not fill four-and-twenty leaves of that brass-bound missal, which Thorold, the acolyte, has dropped amongst the rushes on the floor. Hence, our common people know the laws and respect them; and, what is of much greater importance, they respect the law-makers—long may they continue to deserve respect. But I am not without apprehensions for the future. We are strangely fond of novelty. Since the days of King Egbert, we have been accustomed to consider the French as the very patterns of good government and civilization. And although we have seen king after king expelled, there are numbers amongst us, including some very estimable personages, who continue firm in this delusion. I hear that, amongst the French, they designate such legislative assemblies as ours by the name of a '*colloquium*,' or, as we should say, a *talk*—which they render in their corrupted romance jargon, by the word *Parlement*; and, should our *Witenagemot*, our *Micelgetheat*, ever cease to be a *Meeting of the wise*, or *Great-talk*, it will be worse for England than if a myriad of your northern pirates were to ravage the land from sea to sea.

"Haco, mark my words, if our Witan ever enter into long debates, consequences most ruinous to the state must inevitably ensue; they will begin by contradicting one another, and end by contradicting themselves. Constantly raising expectations which they never can fulfil; each party systematically decrying the acts of the other; the soc-men and churls, who compose the greater body of the people, will at last fancy that the *Witan* are no wiser than the rest of the community. They will suppose the art of government requires neither skill nor practice; that it is accessible to the meanest capacity; that it requires nothing but *Parlement*, or *Great-talk*; and, leaving their ploughs and their harrows, armed with their flails and pitchforks, they will rush into the hall. They will demolish the throne, and, seizing the sceptre and the sword, they will involve the whole state in unutterable confusion and misery."

DIGEST OF CASES.

COMMON LAW.

[Comprising 12 Adolphus & Ellis, Part 4; 1 Adolphus and Ellis, New Series, Part 2; 2 Gale & Davison, Part 2; 3 Scott's New Reports, Part 3; 9 Meeson & Welsby, Parts 3 & 4; and 1 Dowling's Practice Cases, New Series, Part 4: all cases before digested being omitted.]

ACCORD AND SATISFACTION.

(*Acceptance in satisfaction, what amounts to—Money had and received, when maintainable.*) The plaintiffs, merchants at Liverpool, were in the habit of consigning to the defendants, brokers at Montreal, goods on sale or return, and of receiving in payment bills on British houses purchased by the defendants with the proceeds. The plaintiffs having desired that none but undoubted bills should be sent to them, the defendants remitted a bill drawn by and upon parties supposed at the time to be in good credit. The plaintiffs, on receiving it, returned for answer that it had been refused acceptance, and requested the defendants to do what was needful to procure security from the drawer, and to take all legal and necessary steps for their security. In an action brought by the plaintiffs for money had and received, to recover from the defendants the proceeds of the consignment to which this bill had reference, the defendants pleaded the delivery to the plaintiffs, and acceptance by them, of the bill of exchange in full satisfaction. The judge directed the jury, that if the bill was such a one as by the course of dealing between the parties the plaintiffs were bound to take, that was a taking in full satisfaction: Held, that this was a misdirection: for that *acceptance in satisfaction* must be an act of the will in the party receiving.

Quære, whether money had and received was maintainable, the proceeds having been applied by the defendants to the purpose contemplated by the course of dealing between the parties.—*Hardman v. Bellhouse*, 9 M. & W. 596.

ACTION ON THE CASE.

1. (*For waste, who may have.*) A. and his wife being seised of a messuage for their joint lives and the life of the survivor, all the estate and interest of A. became vested in the defendant, who permitted waste during A.'s lifetime: Held, that the wife, who survived A., could not maintain an action on the case against the defendant in respect of such waste. (Co. Litt. 53 b.)—*Bacon v. Smith*, 1 Ad. & E. (N. S.) 345.

2. (*For injury to reversion—Justification under assignment by tenant for benefit of creditors.*) In an action on the case brought by a reversioner for injury done to his reversion, the declaration alleged that certain rooms and apartments, part of a dwelling house of the plaintiff, and certain furniture, were in possession of S. who occupied the same, with the use of the staircase and landings, as tenant at a certain rent; yet the defendants contriving to injure the plaintiff, and to deprive him of the benefit which he derived from the letting of the same, wrongfully broke and entered the said rooms, and made a great noise and disturbance therein, and tore down and prostrated the ceiling over the landing of the staircase and the roof over the same, and tore down divers chimnies, and broke and demolished divers glass windows, and there seized and took certain furniture and converted the same, whereby, &c. The defendants pleaded as to the grievances, so far as they related to and were occasioned by the said breaking and entering the said rooms and apartments, and making the said noise therein, and tearing down and prostrating the ceiling and roof, and tearing down the chimnies and breaking the windows, that one N. S. being seised in fee of the said dwelling house, &c. demised the same to one C. H. for a term yet unexpired, and C. H. having become possessed thereof, was at the same time also possessed of certain furniture therein; that C. H. afterwards, by a certain indenture made between him and the defendants and certain creditors, assigned the said furniture to the defendants for the use of his creditors, the said defendants to be at liberty upon certain contingencies to enter and seize the same; that afterwards the said dwelling house, &c. became and were vested in the plaintiff, and the defendants, upon breach of the terms of the indenture, were desirous of entering and seizing the furniture, and because S. refused, upon being requested, to suffer or permit the defendants to enter into and upon the said rooms, &c. for the purpose of seizing of the said goods, therefore, the defendants for the same purpose did break and enter into and upon the said rooms and apartments and the said staircase and landing, and did to a little and necessary degree tear down and prostrate the ceiling over the said staircase and landing, and the roof over the same, and did tear down and prostrate the said chimnies, and break and demolish the windows, and did seize the said goods, doing and using no more damage or violence than was necessary in that behalf: Held, on demurrer, that the plea afforded no sufficient answer by way of justification to the allegations in the declaration.—*Foulkes v. Scarfe*, 1 D. P. C. (N. S.) 691.

AFFIDAVIT.

1. (*Made by deponent convicted of perjury.*) Where an affidavit was made by a deponent who had been convicted of subornation of perjury, the Court made a rule absolute to take it off the file of the Court.—*In re Sawyer*, 2 G. & D. 141.
2. (*Entitling*) In an action which in the writ of summons was described as “W. J. v. J. E.,” the defendant applied to set aside the service of the writ on the ground of irregularity: his affidavit was entitled, “W. J. v. J. A. E. sued as J. E.” Held good. (2 D. P. C. 383; 3 D. P. C. 393; 7 D. P. C. 648)—*Jones v. Elridge*, 1 D. P. C. (N. S.) 710.
3. (*Reswearing.*) An affidavit need not, when resworn, be signed again by the deponent.—*Liffin v. Pitcher*, 1 D. P. C. (N. S.) 767.

AMENDMENT.

- (*Under 3 & 4 W. 4, c. 42—Statement of record of foreign Court.*) In action of assumpsit, the first count in the declaration stated a contract between the plaintiff in London and the defendant at Königsberg, in Prussia, by which the defendant agreed to sell and deliver to the plaintiff at Königsberg, for the purpose of

being shipped, a certain quantity of good sound seed tares ; that subsequently a portion of the said tares were so delivered and shipped on board a certain vessel at Königsberg aforesaid by the defendant ; yet defendant, disregarding his promise, did not nor would sell and deliver to the plaintiff good sound seed tares, but on the contrary thereof, the said tares at the time of their said delivery and shipment, and on their arrival in London, were, as the defendant at the time of the shipment well knew, very soft, heated, and wholly unfit to be used as and for seed tares, or for any other purpose. Special damage for shipping and insurance expenses, surveying, landing, and selling the tares. Second count, alleging a promise by the defendant that he would superintend the shipping and loading of the tares at Königsberg, would take and use every proper precaution in seeing that the same were properly shipped and stowed on board a fit and proper vessel, yet the defendant disregarded his promise, and did not superintend the shipment of the tares, or take or use any precaution whatever in or towards seeing that the same were properly stowed or shipped, &c., and that the tares were, with the privity and at the instance of the defendant, shipped and stowed on board an unfit and improper vessel, in a very careless, negligent, improvident, unusual, and unmerchantlike manner, whereby, &c. The defendant pleaded to both counts, that before, &c., the defendant was resident at Königsberg, and within the jurisdiction of a certain Court there, and that whilst so resident, the plaintiff impleaded him in the said Court for not performing the same identical promises as in the counts mentioned, and for the damages alleged to have been sustained thereby, and that a judgment or decree was pronounced by the said Court, whereby it was adjudged that the plaintiff had no cause of action in respect of damages, &c., and that the plaintiff should pay the costs of the suit ; that the judgment had not been reversed, and that it was final and conclusive between the parties in the country where the same was pronounced, whereby the plaintiff was precluded, &c. : Replication, that no such judgment, final and conclusive between the parties, modo et forma, was ever pronounced by the said Court. At the trial the defendant, in support of his plea, put in a judgment of the Court of Commerce at Königsberg, " that the plaintiff be barred of his claim which he brought against the defendant on account of a cargo of tares ;" certain " reasons" were appended to the judgment, which showed that the plaintiff " lost his cause of action" by reason of prescription or limitation, but that the suit in that country was to recover back the money paid by the plaintiff for the tares, and was not brought in respect of any damage alleged to have been sustained by their nondelivery or improper stowage or shipment : Held, that there was a variance between the proof and the record, which was not amendable.—*Semble*, that a judgment recovered in a foreign Court upon grounds of prescription or limitation is an effectual bar to a suit in this country upon the same causes of action, even though the limitation in that country operate at the end of six months from the accruing of the cause of action.—*Callendar v. Dittrich*, 1 D. P. C. (N. S.) 730.

ANNUITY.

(*Memorial*.) The memorial of an annuity deed, under 53 Geo. 3, c. 141, s. 2, must state the names of all the parties to it, although one of them may take no interest under it, or may not have executed it.—*Huggins v. Coates*, 1 D. P. C. (N. S.) 827.

APPROPRIATION OF PAYMENTS. See MONEY HAD AND RECEIVED, 2.

ARBITRATION.

1. (*Duty of umpire.*) Where matters in difference are referred to arbitrators, and, if they disagree, to an umpire, and the arbitrators, after hearing witnesses, disagree, the umpire must re-hear the witnesses: if he makes his award merely on the evidence taken down by the arbitrators, it will be set aside. The objection to such proceeding by the umpire may indeed be waived; but, to prevent the award from being set aside, clear proof must be given of the waiver.—*In re Salheld*, &c. 12 Ad. & E. 767.
2. (*Award, when final—Ascertainment of costs of reference.*) By the terms of an order of reference at nisi prius, the costs of the cause were to abide the event, “the costs of the reference and award to be in the discretion of the arbitrator, who shall ascertain the same: Held, that the arbitrator was bound to ascertain and determine the costs of the reference and award.—*Morgan v. Smith*, 9 M. & W. 427; 1 D. P. C. (N. S.) 617.
3. (*Arbitrator's authority.*) A cause and all matters in difference were referred to a legal arbitrator, pending a demurrer to one of the defendant's pleas. By his award he directed judgment to be entered on the demurrer for the defendant. The Court sustained the award.—*Mathew v. Davis*, 1 D. P. C. (N. S.) 679.
4. (*Arbitrator's authority—Husband and wife—Attachment.*) In an action of replevin against husband and wife, the defendants avowed for an annuity charged by will on an estate of which the plaintiff was tenant for life, in favour of the wife, for whose benefit the suit was defended, the husband (who was separated from her) having an indemnity against the costs. The cause and all matters in difference relating to the annuity in question were referred at nisi prius to an arbitrator, who directed a verdict for the defendants, and ordered the sums due in respect of the annuity to be paid by the plaintiff to the wife. The Court held, that he had authority so to do, and granted an attachment for non-payment of these sums to the wife pursuant to the award, although it was sworn that they had been paid to the husband on demand made by him.—*Wynne v. Wynne*, 3 Scott, N. R. 442; 1 D. P. C. (N. S.) 723.

ASSUMPSIT.

1. (*When maintainable—Effect of subsequent bond.*) The defendant opened an account in July, 1834, with a banking company: in October, 1834, he, together with a surety, executed to the managing directors of the company a condition for payment by the obligees to the company, on three months' notice, of all such sums of money, not exceeding 5000*l.*, as should, at the time of the demand, be due to the company in respect of advances already made or thereafter to be made by the company for or on account of the defendant, with interest, &c.: Held, that the company were not precluded by this bond from suing the defendant in assumpsit.—*Holmes v. Bell*, 3 Scott, N. R. 479.
2. (*What consideration sufficient for.*) The reputed father of an illegitimate child promised to pay the mother an annuity if she would maintain the child, and keep secret their connexion: Held, that the maintenance of the child was a sufficient consideration to sustain assumpsit.—*Jennings v. Brown*, 9 M. & W. 496.

ATTACHMENT.

1. (*Against guardian suing for infant plaintiff.*) Where the defendant seeks to obtain an attachment against the guardian of the plaintiff, by whom he sues, for nonpayment of costs pursuant to the Master's allocatur, and the demand is

made under a power of attorney, a copy of the power of attorney must be left with the guardian. The rule for the attachment is, as in other cases, absolute in the first instance.—*Price v. Duggan*, 1 D. P. C. (N. S.) 709.

2. (*For contempt by assault in Master's office.*) Where parties attending a reference for taxation before the Master, left the office at the conclusion of the reference for the day, and one of those parties, who during the reference had insulted the other, then, on the steps of the Master's office, assaulted the latter: the Court refused to grant, at his instance, an attachment as for contempt.—*Ex parte Willon*, 1 D. P. C. (N. S.) 805.

And see HABEAS CORPUS.

ATTORNEY.

1. (*When privileged from disclosing contents of client's deed.*) A party who is protected from producing a deed at Nisi Prius, on the ground that he holds it as a trustee for one of the parties, is not compellable to disclose the contents of it. An attorney for a party in a cause is not bound to state the contents of a deed, of which he first obtained a knowledge by having obtained and read it, at the suggestion of his counsel, at the consultation in the cause. (*Rolfe, B., dubitante.*) (1 Ad. & E. 31; 1 M. & W. 533; 5 Esp. 119; 5 B. & Adol. 502.)—*Davies v. Waters*, 9 M. & W. 608; 1 D. P. C. (N. S.) 651.)
2. (*Plea of privilege by—Nature and form of.*) A plea of privilege by an attorney of the Court of Queen's Bench, pleaded to an action brought against him in this Court, is not a plea to the jurisdiction, and may be pleaded by attorney. (*Gillb. C. P. 187, 209; Styles, 413.*) Semble, that in such plea it is sufficient to state that the defendant was not at the commencement of the action, nor had ever been, an attorney of this Court, without going on to aver that he was not such attorney at the time of the plea pleaded. Nor need it negative his having, since 7 W. 4 and 1 Vict. c. 56, practised in this Court. (5 M. & W. 293.)—*Hunter v. Neck*, 3 Scott, N. R. 448.
3. (*For what offences struck off the roll.*) Where an attorney, in the progress of a cause, has been guilty of misconduct which amounts to an indictable offence, the Court will entertain an application to strike him off the roll, although they will not call upon him to answer the matters of the affidavit. (Cowp. 829; 1 Bing. 142.)

It is a sufficient ground for striking an attorney off the roll, that he procured a witness of the adverse party to keep out of the way at the trial.—*Stephens v. Hill*, 1 D. P. C. (N. S.) 669. See also *Robertson v. Mills*, Id. 772.

4. (*Admission—Notices.*) Under special circumstances, the Court allowed an articulated clerk to put up his notices after the commencement of Easter Term, for the purpose of admission on the last day of Trinity Term, he undergoing a fresh examination.—*Exp. Chandler*, 1 D. P. C. (N. S.) 814.

And see WARRANT OF ATTORNEY, 1.

BAIL.

- (*Under 1 & 2 Vict. c. 110, s. 4, right of exception to, when waived.*) A plaintiff does not waive his right of exception to bail put in under the stat. 1 & 2 Vict. c. 110, s. 4, by delivering a declaration in chief, and consenting to further time to plead.—*Reg. v. Sheriff of Montgomeryshire*, 9 M. & W. 448.

BANKRUPTCY.

1. (*Payment in contemplation of bankruptcy, what is—Time of notice under 1 & 2*

Vict. c. 110, s. 8, computation of.) A trader in a state of utter insolvency, after an abortive attempt to compound with his creditors, and after having been served with an affidavit and notice under the 1 & 2 Vict. c. 110, s. 3, sold his whole stock and effects by auction, and with the proceeds paid the composition he had before offered (7s. 6d. in the pound) to such of his creditors as would accept it, and amongst others to the defendant. In an action by the assignees (under a fiat issued the next day after such payment) to recover back the money so paid, the jury having found for the defendant, the Court twice ordered a new trial.

Quære, whether, in the computation of the twenty-one days mentioned in the 1 & 2 Vict. c. 110, s. 8, the day on which the notice was served is to be included. (2 M. & W. 473; 8 Ad. & E. 577; 15 Ves. 248.)—*Gibson v. Muskett*, 3 Scott, N. R. 419, 427.

2. (*Operation of certificate on landlord's right of distress.*) A landlord distrained the goods of A. on his tenant's premises for rent; the tenant afterwards became bankrupt, and obtained his certificate: Held, that the certificate did not operate as a release of the rent, and therefore that the landlord had a right, in replevin at the suit of A., to avow for a return of the goods.—*Newton v. Scott*, 9 M. & W. 434.

3. (*Evidence—Certificate—Right of bankrupt, after second commission, to after-acquired property—Right of action of administrator.*) A certificate under the Bankrupt Act is evidence, as against the bankrupt, of a valid bankruptcy, without proof of the petitioning creditor's debt, &c.

A party who has taken possession of the goods of an intestate after his death, cannot set up, as a defence to an action of trover by the administrator, that the intestate had been first insolvent and then bankrupt, and had not paid 15s. in the pound under the fiat, and that therefore the property in the goods vested absolutely in the assignees; the goods having been acquired by the intestate after the bankruptcy, and he having been allowed by the assignees to retain possession of them. (2 B. & C. 293; 8 Ad. & E. 470.)—*Fyfe v. Chambers*, 9 M. & W. 460.

4. (*Bond under 1 & 2 Vict. c. 110, s. 8.*) The Court will not order a bond given under this statute to be delivered up to be cancelled, on affidavit that the defendant has rendered himself to prison according to the condition of the bond.—*Ridler v. Chappelow*, 1 D. P. C. (N. S.) 637.
5. (*Construction of 2 & 3 Vict. c. 29, s. 1—Notice of act of bankruptcy.*) Notice to the attorney of the execution creditor, before the issuing of the fi. fa., of a prior act of bankruptcy committed by the defendant, held sufficient, notwithstanding the 2 & 3 Vict. c. 29, s. 1, to invalidate the execution as against his assignees under a fiat issued after the fi. fa. was lodged with the sheriff.—*Rothwell v. Timbrell*, 1 D. P. C. (N. S.) 778.

BEER ACT.

(*Liability to penalties of retailers of beer licensed under 1 Will. 4, c. 64.*) The keeper of a beer-shop, licensed under 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 84, is liable to the penalties imposed by 56 Geo. 3, c. 58, s. 2, for having in his possession any of the prohibited articles therein specified, or any other article or preparation to be used as a substitute for malt or hops.

In order to render such a person liable to those penalties, for having in his possession any of the articles enumerated in the 56 Geo. 3, c. 58, s. 2, it is unnecessary to aver or prove, either that the party had them in his possession to be

used as a substitute for malt or hops, or that he had them in his possession with any criminal intention. But where the information is for having in his possession any article *not designated by name* in that section, it is necessary to show that it was intended to be used as a substitute for malt and hops in the making of beer.—*Attorney-General v. Lockwood*, 9 M. & W. 378.

BENEFICE. See CORPORATION, 1.

BILL OF LADING. See FREIGHT.

BILLS AND NOTES.

1. (*Liability of shareholders of company on bill accepted by directors.*) Declaration on a bill of exchange made by R. P., directed to A., B., C., D., E., and F., and accepted by them. Pleas, by A., B., and C., 1st, that R. P. did not make the bill in manner and form, &c.; 2nd, that A., B., and C., did not accept in manner and form, &c.; and issues thereon. Judgment by default against D., E., and F. The bill produced at the trial was drawn on the directors of a joint-stock company, and accepted "for the company" by D. and E., signing as directors. F. signed his name with theirs as "manager." All the defendants were shareholders, and all but F. were directors. The jury found that F., as manager, was not an acceptor of the bill: Held, that F. was not in law liable as an acceptor, either by his having actually signed his name with those of D. and E., or by their having accepted the bill as directors of a company in which he held shares; and that the plaintiff had failed on both issues. (3 Bing. N. C. 963.) *Bull v. Morrell*, 12 Ad. & Ell. 745.
2. (*Fraud, when a defence to action by indorsee.*) To an action by indorsee on a bill drawn by the defendants, A. and B., as partners, payable to their own order, and indorsed by them, the defendant B. pleaded that the bill was indorsed by A. to the plaintiff, in the partnership name, after a dissolution of partnership, without the privity or consent and in fraud of the defendant B., and for A.'s private purposes; and that the plaintiff knew of the dissolution at the time of the indorsement: Held bad, after verdict for the defendant, for not showing that the plaintiff had colluded with A., or was privy to the fraud.—*Lewis v. Reilly*, 1 Ad. & E. (N. S.) 349.
3. (*Liability of trustees on bill drawn by one of them—Notice of dishonour.*) A. and B. and S. M., in 1832, assigned their stock in trade to trustees, who were to carry on the business in the name of "S. M." alone, for the benefit of creditors. S. M. was employed by them as their agent to carry on the business accordingly. S. M., while conducting such business, carried on a separate business of his own up to 1834. The plaintiff had been in the habit of discounting bills for the old firm of A. and B. and S. M., and, after the assignment to the defendants, had been accustomed to discount bills indorsed in the name of "S. M." for him in his private business and other his private purposes, the proceeds of which S. M. had applied sometimes for carrying on his private business: he indorsed bills in the name of S. M., and applied the proceeds indiscriminately to his own private purposes and to carrying on the assigned business. In an action on the bills against the trustees,
 Held, that the signature of "S. M." to the bills was *primâ facie* their signature.
 Held also, that a notice of dishonour, given by the holder of a bill of exchange, need not inform the party addressed that the holder looks to him for payment;

but that it must inform him that the bill has been presented to the acceptor ; and therefore that the following notices were insufficient : " Sir—A bill (describing it) due yesterday is unpaid, and I am sorry to say, the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to-day."

" Sir—W. H.'s acceptance (describing it) is unpaid. He has promised to pay it in a week or ten days."

" Sir—A bill (describing it) lies due and unpaid at my house."—*Furse v. Sharwood*, 2 G. & D. 116.

4. (*Debt, when maintainable on.*) Debt lies not by an indorsee against the acceptor of a bill of exchange. (4 Rep. 92, b. ; 2 Bos. & P. 78 ; 5 Scott, 68.)—*Powell v. Ansell*, 3 Scott, N. R. 444. See also *Levin v. Edwards*, 1 D. P. C. (N. S.) 639.
5. (*Right of action against drawer on non-acceptance.*) The holder of a bill of exchange, on *non-acceptance*, and protest and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the *non-payment* of the bill when due. The Statute of Limitations, therefore, runs against him from the former and not from the latter period. (Doug. 55 ; 5 M. & Sel. 282 ; 7 Taunt. 312 ; 1 Stark. 7 ; 13 East, 498.)—*Whitehead v. Walker*, 9 M. & W. 506.
6. (*Consideration—Payment under mistake of facts.*) To an action on a promissory note, the defendant pleaded, that before he making of the note, one W. M. had made his bill of exchange, dated the 11th of April, 1840, and directed the same to one S. S. requiring him to pay to his order 200*l.* three months after date, that S. S. at the request of W. M. accepted the said bill for his accommodation, and that the defendant subsequently indorsed the said bill for the accommodation of the said W. M., and that after the indorsement, the date of the bill was altered to a certain other date, namely, the 21st of April, 1840, without the knowledge or consent of the defendant, and that the defendant remained ignorant of the said alteration from thence until the making of the promissory note in the declaration mentioned, and that after the making of the bill, and after the said indorsement of the defendant. and after the said alteration, the bill was paid to the plaintiff, who held it until it became due and payable ; that on the 22d of August, 1840, the plaintiff applied to the defendant for payment of the amount thereof as indorser, and that he, believing that he was liable to the payment of the same, and the bill was then in the same state as when he had indorsed it, and being ignorant of the said alterations and never having agreed thereto, agreed, in consideration of his supposed liability on the bill, and for no other consideration whatever, to make and deliver to the plaintiff the promissory note in the declaration mentioned ; and that the defendant did, in pursuance of the said agreement, make the said promissory note for the consideration aforesaid, and made and delivered the same under the mistaken belief that he was liable to pay the bill, and that he never had any other consideration for the said note : Held, on motion for judgment non obstante veredicto, a good defence to the action, and that the defendant was not bound to negative his *means of knowledge* of the facts relieving him from his liability on the bill of exchange. (9 M. & W. 54.)—*Bell v. Gardner*, 1 D. P. C. (N. S.) 683.
7. (*Special acceptance—Variance.*) In assumpsit by indorsee against acceptor of a bill of exchange, the declaration stated the bill to be payable at Messrs. W.

& Co.'s, and alleged presentment at their banking-house, and non-payment. The bill when produced at the trial appeared to bear a general acceptance (under the 1 & 2 Geo. 4, c. 78) with a memorandum making it payable at W. & Co.'s: Held, that there was no material variance between the declaration and the proof. —*Blake v. Beaumont*, 1 D. P. C. (N. S.) 697.

And see CHEQUE; FREIGHT; LIMITATIONS, STATUTE OF, 2; PLEADING, 9; PRINCIPAL AND SURETY, 1; STAMP, 3.

BOND. See ASSUMPSIT, 1.

BRIDGE.

(*Bridge repairable by the county, what is.*) It is not essential to a "bridge," in the legal sense of the word, that it should be a structure over water which flows at all times.

A structure called "Swarkestone Bridge" was 1275 yards long; at the eastern end were five arches, under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the waters of the Trent flowed in the time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge: Held, that it was properly so described, and that the verdict was properly entered for the Crown. (1 B. & Adol. 289, 297.) —*Reg. v. Inhabitants of Derbyshire*, 2 G. & D. 97.

CHARTER. See CORONER.

CHARTERPARTY. See FREIGHT.

CHEQUE.

(*Time for presentment.*) The holder of a cheque is bound to present it for payment within a reasonable time—that is, in the course of the day succeeding that on which he receives it from the drawer; and that, whether he presents it himself or through his bankers. The plaintiff received from the defendant a cheque upon Y. & Co. (bankers not using the clearing-house) before 5 o'clock on the 10th of March, and paid it in to his bankers, W. & Co. on the following day; W. & Co. presented it for payment on the 12th, shortly after Y. & Co. had stopped payment: Held, that as between the drawer of the cheque and the payee, the presentment was too late. (2 Campb. 537; 4 B. & Ad. 572; 4 Bing. N. C. 266; 4 B. & Cr. 330.)—*Alexander v. Burchfield*, 3 Scott, N. R. 555.

COGNOVIT.

(*What is.*) A judge's order by consent, authorizing the plaintiff to sign judgment on default in payment of the debt and costs by a given day, is not within the statute 1 & 2 Vict. c. 110, s. 9. (9 D. P. C. 748.)—*Stevens v. Miller*, 3 Scott, N. R. 495.

CONTRACT OF SALE.

(*Of goods "to arrive"—Warranty.*) The defendant, by a bought and sold note, agreed to sell the plaintiffs "100 tons of nitrate of soda, at 18s. per cwt., to arrive ex Daniel Grant, to be taken from the quay at landing weights," &c.; and below the signature of the brokers there was the following memorandum:

"Should the vessel be lost, this contract to be void." Held, that the contract did not amount to a warranty on the part of the seller that the nitrate of soda should arrive if the vessel arrived, but to a contract for the sale of goods at a future period, subject to the double condition, of the arrival of the vessel, with the specified cargo on board. (6 M. & W. 224; 5 M. & W. 644.)—*Johnson v. MacDonald*, 9 M. & W. 600.

COPYHOLD.

1. (*Mandamus to admit to copyhold in Crown manor—Practice in mandamus.*) A mandamus to admit to a copyhold tenement must be directed to the lord as well as to the steward. (7 D. P. C. 709.)

A mandamus to admit will not issue to the steward of a manor belonging to the Crown, though he may have received his appointment from the commissioners of woods and forests, under stat. 10 Geo. 4, c. 50, s. 14. That statute, which gives the commissioners the management of the land revenues of the Crown, does not divest the legal estate out of the Crown.

Where the validity of the return to a mandamus is argued on a concilium, the defendant has a right to object to the writ in matters of substance appearing on the record; and the objection, that it is directed to the steward of the manor alone, when the lord ought to be joined, is matter of substance.—*Reg. v. Powell*, 1 Ad. & E. (N. S.) 352.

2. (*Steward of court baron, how far responsible for acts of bailiffs.*) The steward of a Court Baron is a judicial officer, and therefore is not responsible for the acts of the regular bailiffs of the Court to whom process is directed. But he is responsible where he directs the process to bailiffs specially nominated by the party who sues it out, taking an indemnity. (3 B. & Ald. 473; M. & M. 52; 4 D. P. C. 224.)—*Bradley v. Carr*, 3 Scott, N. R. 521.

CORONER.

(*Right of appointment of, by what words granted—Evidence—Duchy of Lancaster.*) By charter of the 23 Edw. 3, the King granted to the Earl (afterwards Duke) of Lancaster, (inter alia), that he might have the return of all writs of the king and his heirs, and summons of the Exchequer, and the attachment as well of pleas of the Crown [attachiamenta de placitis coronæ] as of other pleas whatsoever, in all his lands and fees, so that no sheriff or other bailiff or minister of the King, or his heirs, might enter those lands or fees to execute the same writs and summons, or to make attachment of pleas of the Crown, or other pleas aforesaid, or to do any other office there, unless in default of the same earl and his bailiffs and ministers in his lands and fees aforesaid: Held, that thereby the right to appoint coroners within the Duchy of Lancaster was granted, and that such right was an exclusive one: that, therefore, notwithstanding modern usage to the contrary, the county coroner had no authority to exercise the office within any of the possessions of the duchy concurrently with the duchy coroners, nor unless in default of their performance of the office.

Upon a question whether the Crown, in right of the duchy of Lancaster, had the exclusive right, under the above grant, of appointing a coroner within the honour at Pontefract, evidence of appointments of coroners, and of their acting, in other parts of the duchy, out of the honour of Pontefract, was held admissible.

By an order made in 1670, by the Chancellor and Council of the Duchy of Lancaster, after reciting that the Court was informed that the coroner within the honour of Pontefract, parcel of the duchy, had usually returned their inquests to

the Crown Office, without taking notice therein that they arose within the liberties of the duchy, it was ordered that the coroners should thenceforward specify in their returns when and where the inquests were held: Held admissible in evidence, although no proof was given of anything done under it.—*Jewison v. Dyson*, 9 M. & W. 540.

CORPORATION.

1. (*Mandamus to seal presentation—Return—Demand and refusal—Right of nomination to benefice.*) Where a hospital for the relief of poor, needy, and impotent people is duly incorporated, and consists of a master and twelve poor brethren, and the advowson of a living is conveyed to them to hold to the use of the master and brethren and their successors for ever, the right to nominate to the living belongs to the majority of the entire body of master and brethren, and the master's concurrence in the act of the majority is not necessary.

When the majority have nominated the party at a corporate meeting, and the master refuses to put the common seal to a presentation, he will be compelled to do so by mandamus. And if in his return to the writ he merely insists on his right to withhold his consent, and to refuse to seal it, he cannot object that there was no corporate resolution under seal, or that the writ insufficiently states his custody of the seal, or that no presentation has actually been tendered to him for signature, or that the majority having only voted orally for the prosecutor may retract their resolution. And it is no answer to the writ, that there are visitors appointed by the founder, to whom disputes between the master and brethren are to be referred.

Semble, where the writ suggests a due election of the prosecutor by the persons entitled to elect, a return stating facts and documents from which it appears that there was no right in the electors is sufficient, without denying the right in direct terms.

Where on application for a mandamus to a party to execute an instrument, it may be presumed (as in the above case) that it is a simple one, it is not necessary to tender an instrument to him for execution. But if, either from the nature of the instrument, or from the statement of the parties, it appears that there is anything peculiar in the nature of the instrument, he has a right to require that the instrument should be a proper one, and that he should have the means of knowing that it is so.—*Reg. v. Kendall*, 1 Ad. & E. (N. S.) 366.

2. (*When indictable.*) A corporation aggregate may be guilty of a misdemeanor by non-feasance, and in such case an indictment is maintainable against it in its corporate name. (12 Mod. 559; 3 East, 16; 14 East, 348; 9 C. & P. 469.) —*Reg. v. Birmingham and Gloucester Railway Company*, 2 G. & D. 236.

And see LEASE; MANDAMUS, 1.

COSTS.

1. (*On several issues—Of rule for new trial.*) Declaration in case, consisting of a single count, charged that the defendant maliciously and without probable cause indicted plaintiff for perjury. The indictment was set out: and it alleged certain evidence to have been given by plaintiff, which was set forth continuously, and then several assignments of perjury in various parts of such evidence were added, with a general allegation of perjury at the end of the indictment, which contained only one count. The declaration then charged that defendant maliciously, and without probable cause, prosecuted the indictment, and that plaintiff was acquitted; and alleged damages in respect of the whole prosecution, without distinguishing as to the several assignments of perjury. Plea, not guilty.

Plaintiff proved want of reasonable and probable cause as to one assignment only, and took a verdict with damages in respect to that: Held, 1, that the plaintiff was not entitled to costs in respect to the assignments as to which the damages were not given, though witnesses attended for him, under subpoena, to disprove, if necessary, the truth of those assignments. 2. That defendant was not entitled to the costs of the defence prepared by him in respect of such assignments.—Where plaintiff obtains a verdict, and defendant afterwards obtains a rule for a nonsuit or a new trial, and upon cause shown, it is ordered by consent that the damages be reduced, but that on payment of such reduced damages and the taxed costs of the cause, the verdict be vacated, and a *stet* process entered, the plaintiff is entitled to the costs of the opposing rule, as costs in the cause. (5 M. & W. 483.)—*Delisser v. Towne*, 1 Ad. & E. (N. S.) 333.

2. (*Of proof of document—Notice to admit.*) A party who proposes to adduce in evidence a document at the trial, is bound in every case, in order to entitle himself to the costs of proving it, to give a notice to admit, under R. 20 of H. T. 4 Will. 4, to afford the other party an opportunity of admitting it, notwithstanding the document is put in issue on the pleadings, and although, on application to the attorney on the other side, he had refused to make the admission on the ground that the document was a forgery.—*Spencer v. Barrough*, 9 M. & W. 425.
3. (*Double costs under 11 G. 2, c. 19, s. 21.*) Where a defendant pays money into Court, in an action for an illegal distress, and the plaintiff repays damages ultra, on which issue the defendant succeeds, he is not entitled to double costs under stat. 11 Geo. 2, c. 19, s. 21.—*Handcock v. Foulkes*, 9 M. & W. 431; 1 D. P. C. (N. S.) 658.
4. (*In trespass, where damages are under 40s.—Retrospective operation of 4 & 5 Vict. c. 28, s. 2.*) The stat. 4 & 5 Vict. c. 28, s. 2, applies to cases in which the plaintiff had not only obtained a verdict, but had signed judgment and taxed his costs, before the passing of that act.—*Roadknight v. Green*, 9 M. & W. 652.
5. (*Certificate under 3 & 4 Vict. c. 24, s. 2.*) Where it is sought to impeach the exercise of a judge's discretion in granting a certificate under this act, there must be clear proof of the allegation on which the party grounds his application. And where, on the execution of a writ of inquiry before the under sheriff, such a certificate was granted, and a rule was obtained to set it aside on the ground that the application for it had been acceded to, after it had once been refused, and upon representations made by the jury; the Court held that the party applying ought to have obtained the acquiescence of the under sheriff in his statement of what passed at the trial, before he made the application.
 Semble, if such facts had been clearly made out, the Court would have set aside the certificate.—*Pryme v. Brown*, 1 D. P. C. (N. S.) 680.
6. (*Taxation—Expenses of witnesses antecedent to trial.*) In an action against an appraiser for negligently valuing certain premises, the plaintiff having been non-suited, the Master disallowed the expenses of several witnesses while employed before the trial, to inspect the premises, with a view to their giving evidence on the subject of the valuation. The Court refused a rule to review the taxation. (3 Brod. & B. 72.)—*May v. Selby*, 1 D. P. C. (N. S.) 708.
7. (*Of several defendants in trespass.*) In trespass against three defendants, who appeared by the same attorney and pleaded guilty, one being acquitted, it was

held that the attorney was entitled to have one-third of his general bill of costs against the three defendants set-off against the plaintiff's bill; and that unless there were some special circumstances in the case, the Master was bound to adopt that principle of taxation. (2 C. M. & R. 333; 5 Ad. & E. 403; 1 Bing. N. C. 573.)—*Norman v. Clemenison*, 1 D. P. C. (N. S.) 718.

8. (*Security for—Discontinuing.*) The giving notice of trial by proviso, in an action on a bill of exchange, is not sufficient to render the defendant such an actor in the cause as to render him liable to give security for costs, although he is insolvent. And if the plaintiff, after notice of the defendant's insolvency, takes a step in the cause, the Court will not allow him to discontinue without payment of costs.—*Ford v. Stock*, 1 D. P. C. (N. S.) 763.

And see *MANDAMUS*, 2, 3.

COURT OF REQUESTS ACTS.

- (*Construction of Tower Hamlets Act—Power of inferior judge to certify to give costs.*)—The sheriff or other inferior judge to whom a writ of trial is directed out of a superior court has no authority to certify, under the Tower Hamlets Court of Requests Act, 23 Geo. 2, c. 30, s. 8, that there was a probable and reasonable cause of action for 40s. or more.

A party who sues in a superior Court a defendant residing within the jurisdiction of the Tower Hamlets Court of Requests Act, for a debt being the balance of account on a demand originally exceeding 5*l.*, but reduced below that amount by payments before action brought, is not liable to costs, though he recover less than 40s. (4 Bing. N. C. 308.)—*Elsley v. Kirby*, 9 M. & W. 536.

COVENANT. See *LEASE*; *PRINCIPAL AND SURETY*, 2.

DEVISE.

1. (*Construction of will—Effect of word “estate.”*) The father of M. devised lands to her in fee, subject to an annuity-charged on the land, with power of entry and distress.

M. being in possession under the will (before stat. 7 Will. 4 & 1 Vict. c. 26,) devised as follows: “As to my worldly goods given me by my father, I give and bequeath to my son C. an estate called L., in the parish of B., during his natural life; and after his decease, I give and bequeath the same unto his son T., free of legacies and mortgages. There were then five bequests of 1*s.* respectively to two sons (not including C.) and three daughters of the devisor, and a bequest of furniture and wearing apparel to two other daughters; and then the following clause: Lastly, all the rest, residue and remainder of my goods, chattels, rights, and credits, personal and testamentary estates, wheresoever and whatsoever, I hereby give and bequeath to my son C., whom I make sole executor of this my will, he paying my just debts and legacies, before given in and by this my will.”

Held, on a special case not stating any facts as to real or personal property of the devisor, except the property called L., and not stating the existence of any mortgage on L., that T. took only a life estate in L. (4 Taunt. 176; 7 East, 259; 7 Ad. & E. 195.)—*Doe d. Lean v. Lean*, 1 Ad. & E. (N. S.) 229.

2. (*Of fee by implication—Of estate for life by implication.*) A testator, being possessed of estates in the counties of L. and H., bequeathed certain legacies and annuities to his two sons and two daughters. The will then proceeded thus: “That my wife, M. C., may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley-place, Chester, together with the use of the plate, linen, &c., and all the joint property

in houses in Liverpool, and likewise of interest of money as often as due arising from the three and four per cents., and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters as already mentioned; at her decease, it is my will and pleasure that M. N., and C. C., (his daughters), shall divide equally between them, as *residuary legatees, whatever I may die possessed of*, except what is already mentioned in favour of others." The will, after giving the executors the power of selling certain leasehold houses in Liverpool, concluded thus:—"But the house in Chester must not be sold as long as my wife lives:"—Held, that the residuary legatees took the estates in L. and H. for an estate in fee-simple, commencing at the death of the wife, and that they took the Stanley-place house in fee-simple in remainder, expectant on the death of the wife. Held, also, that the wife did not take any interest for life by implication in the estates in L. and H. (1 Bro. Ch. C. 437; 7 Taunt. 82; 6 B. & C. 518.)—*Davenport v. Coltman*, 9 M. & W. 481.

And see ESTATE PUR AUTRE VIE.

DISTRESS.

(*By grantee of rent-charge, what and whose goods may be taken under—Pleading.*) Replevin for stacks and trusses of hay and stacks of oats. Avowry, that a third person was seised of the premises which, &c. and being so seised, he, by indenture, granted to the defendant an annuity or rent-charge to be charged upon and issuing and taken from the premises, and that in case it should be in arrear, that it might be lawful for the defendant to enter upon the premises to distrain, in the same manner as the law directs in case of rent in arrear: Held, on general demurrer to the avowry, that the grantee might, under 2 Will. 3, c. 5, and 4 Geo. 2, c. 28, and the power in the indenture, take the oats and hay in *stacks or trusses* as a landlord under a distress for rent. (2 C. & J. 142.) Held, also, on objection that the defendant could not distrain upon the goods of a stranger, or of one in possession under a subsisting demise made previous to the grant of the rent-charge, and that, for aught that appeared in the avowry, the goods distrained might be those of a stranger, or of a person claiming under a previous demise—1. That the goods of a stranger were distrainable for such rent-charge, under such a power, (1 Ad. & E. 191); and 2, though the terms in the avowry, "seised of the premises," were not inconsistent with the existence of a subsisting lease, since the possession of the lessee would be that of a lessor, so that the lessor might be said to be "seised" notwithstanding the lease, yet that the objection could not avail, because, if the plaintiff did hold under a lease made prior to the rent-charge, he might and ought to have replied that fact.—*Johnson v. Faulkner*, 2 G. & D. 184.

And see BANKRUPTCY, 2.

DUCHY OF LANCASTER. See CORONER.

ECCLESIASTICAL COURT.

(*Visitatorial jurisdiction of bishop, how to be exercised.*) By the 3 & 4 Vict. c. 86, s. 23, "no criminal suit or proceeding against a clerk for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted." By sect. 25, "nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses, which the archbishops or bishops of England and Wales may now according to law exercise personally, and without any process in court."

Where, after the passing of the act, an archbishop, at his visitation, received a charge of simony against a clerk, and pronounced sentence of deprivation against him, and interdicted him from exercising his functions on pain of greater excommunication: Held, that the proceeding ought to have been conducted in the mode directed by the statute, because it was a criminal proceeding in court, within the words of section 23, and was not within the reservation of section 25, because the power of depriving "personally, and without process in court," did not belong to the archbishop before the statute; and this Court prohibited the archbishop from enforcing the sentence.—*Reg. v. Archbishop of York*, 2 G. & D. 202.

EJECTIONMENT.

1. (*Time for judgment against casual ejector.*) It is not too late to move for judgment against the casual ejector in the term following that in which the tenants have had notice to appear, whether the cause be a town or country cause. (4 D. P. C. 88, 124.)—*Doe d. Walker v. Roe*, 9 M. & W. 426; 1 D. P. C. (N.S.) 613; see also *Doe d. Fell v. Roe*, 1 D. P. C. (N.S.) 777.
2. (*Service.*) Where service was effected on a person in apparent possession of the premises, who stated himself to be an agent of the tenant, who was abroad, the Court refused a rule for judgment, no facts being shown whence such agency could be inferred.—*Doe d. Nottage v. Roe*, 1 D. P. C. (N.S.) 760.

And see WARRANT OF ATTORNEY, 5.

ESCAPE.

- (*Illegal custody—Estoppel.*) A debtor arrested in the country on mesne process, brought himself by habeas corpus before a judge in town, by whom he was committed to the custody of the marshal of the Marshalsea. Shortly afterwards he filed his petition in the Insolvent Court for his discharge, under 7 Geo. 4, c. 57, and that court ordered that he should be discharged as to the creditor's debt, as soon as he should have been in custody fifteen months. On this he returned to the marshal's custody, and while there was brought up by habeas corpus cum causa before the Central Criminal Court, to plead to an indictment for perjury. He pleaded not guilty, and traversed to the next sessions, but, as he could not give bail as required, that Court committed him to Newgate until discharged by due course of law. Subsequently he was bailed, whereupon the keeper of Newgate, without any fresh warrant, carried him back to the Marshalsea, where he was received by the marshal. After this, and before the expiration of the fifteen months, he escaped. In case against the marshal for the escape, held, that the defendant's charge ceased when he brought the prisoner before the Central Criminal Court, and that, as it had not been revived by any fresh warrant of commitment, the custody of the prisoner, at the time of the escape, was illegal. That the defendant therefore was not liable, and that his conduct in receiving the prisoner did not estop the defendant from saying that he had no right to detain him.—*Contant v. Chapman*, 2 G. & D. 191.

ESTATE PUR AUTRE VIE.

- (*Devise of—Special occupant.*) Where a lessee of lands demised to him, his heirs and assigns, for lives, devised the premises for the residue of the term to W. J. L. and his assigns, who died intestate: Held, that the premises did not go to the heir of W. J. L., but to his personal representative, under the Statute of Frauds, 29 Car. 2, c. 3, s. 12.—*Doe d. Lewis v. Lewis*, 9 M. & W. 661.

EVIDENCE.

1. (*Admission of party to suit, when evidence.*) In replevin, the admissions of the plaintiff are evidence to show the terms upon which he held the premises, though he held under an agreement in writing that is not produced. (6 M. & W. 664.)—*Howard v. Smith*, 3 Scott, N. R. 574.
2. (*Secondary evidence, no degrees of.*) There are no degrees of secondary evidence; and therefore, semble, that in an action by lessor against lessee, the former may give parol evidence of the contents of the lease, where the lessee declines to produce it, without accounting for the non-production of the counterpart. (6 C. & P. 206; 7 M. & W. 102.)—*Hall v. Ball*, 3 Scott, N. R. 577.
3. (*Of handwriting of attesting witness—Erasure, when to be explained.*) The defendant became tenant to the plaintiff of a farm from year to year by parol, but afterwards signed an agreement containing certain stipulations as to the mode of tillage. In an action by the landlord for breaches of these stipulations, the agreement, on being produced, contained an erasure in the term of years mentioned in the habendum, which was altered from seven to fourteen: Held, that in this action the agreement might be received in evidence without any explanation of the erasure, the term of years being immaterial to the parol contract between the parties to hold from year to year, subject only to the terms of the agreement as to the cultivation of the land.
The agreement was attested by the landlord's steward, who, after having been apprehended for embezzlement, had absconded, and could not be found after search at his house and at the inns he was in the habit of frequenting: Held, that evidence of his handwriting was properly received.—*Earl of Falmouth v. Roberts*, 9 M. & W. 469.
4. (*Parol evidence of written notice.*) Where the question was, whether goods carried by the defendant were subject to his general lien, held, that parol evidence of the contents of a notice hung up in the defendant's office, but not fixed to the freehold (whereby it was sought to fix the plaintiff with knowledge of the terms of dealing) could not be given, but that the notice itself must be produced.—*Jones v. Tarleton*, 1 D. P. C. (N. S.) 625.

And see ATTORNEY, 1; CORONER.

EXCISE ACTS.

- (*Permit, in whose name to be made out.*) Where G., the licensed keeper of a public house, sold the lease of it to N., who entered into the occupation of it, the license still remaining in the name of G.; and a quantity of spirits, which required a permit for its removal, under 2 Will. 4, c. 16, was supplied by a distiller on the order of N., and delivered on the premises in question: Held, that a permit made out in the name of G. was a valid permit under the statute.—*Nicholson v. Hood*, 9 M. & W. 365.

EXECUTOR AND ADMINISTRATOR.

- (*Executor, when chargeable as assignee of lease—Assignment, what constitutes—Memorial of assignment, how far evidence.*) The plaintiffs declared in covenant upon an indenture of lease, made by one Haygarth to one Stead, of certain premises, to hold from Midsummer, 1786, for ninety-nine years, deducing their title to the reversion from the lessor by various mesne assignments, and alleging that "all the estate, &c. of Stead, of and in a great part of the demised premises, with the appurtenances, by assignment thereof then made, came to and vested in the defendant, whereupon and whereby the defendant became and was

possessed of the said part of the demised premises, and continued so possessed until the commencement of the suit;" and they then proceeded to assign as a breach of covenant the non-payment of additional rents reserved by the lease, and also the not keeping the premises in repair. The defendant, by her plea, traversed "that all the estate, &c. of Stead, of and in the said part of the premises, by assignment thereof made, came to and vested in her, in manner and form, &c.," upon which issue was joined: Held, that the affirmative of this issue was sustained by the proof that the defendant was the executrix of an assignee, though she had never entered or taken the profits.

A demise by an assignee of part of the premises held by him, at a different rent (payable to himself), and for a period longer than his own term, operates in law as an assignment, and may be so treated in pleading.

The defendant's testator was in possession of the demised premises under the will of one Papworth, who took by assignment by one Thick: Held, that a memorial of the assignment from Thick to Papworth, signed by the latter, was evidence against him and those claiming under him.—*Wollaston v. Hakewill*, 3 Scott, N. R. 593.

And see BANKRUPTCY, 3.

EXTENT.

Where a sum of money was in the hands of the accountant general in bankruptcy, to the credit of a party against whom an extent had issued, and the sheriff returned that he had seized the money into the hands of the queen, the Court made an order absolute on the sheriff to pay it over to the crown, but refused to make the accountant general a party to the rule.—*Reg. v. Austin*, 1 D. P. C. (N. S.) 666.

FACTORS' ACT.

(*Construction of 6 Geo. 4, c. 94, s. 2.*) P. & Co., owners of a cargo of tobacco, on the arrival of the vessel, placed the bill of lading, indorsed in blank, in the hands of W., as their factor for sale. W. entered the goods at the Custom-House in his own name, and, before the cargo was weighed, and without the knowledge of P. & Co., obtained a dock-warrant for it in his own name, which he pledged with H. & Co. as a security for money advanced by them to him:—Held, on error in the Exchequer Chamber, that W. was not, under the circumstances, by reason of his being intrusted with the bill of lading, necessarily and impliedly intrusted with the dock warrant, &c., within the meaning of the Factors' Act, 6 Geo. 4, c. 99, s. 2; but that whether he was so intrusted or not was a question of fact for the determination of the jury. (6 M. & W. 572.)

Held also, that the judge was not bound to state to the jury what was an intrusting in point of law.—*Hatfield v. Phillips*, 9 M. & W. 647. [See now the stat. 5 & 6 Vict. c. 39, abstracted *ante*, p. 263.]

FEIGNED ISSUE.

(*Construction of—Proof of title in.*)—The right of nomination to a fellowship being in dispute between two parties claiming under the same grant, the Court directed an issue to try "whether the plaintiff had a better right than the defendant to nominate." On the trial it appeared that the defendant had nominated for nearly twenty years, and that vacancies occurred about once in five years; that the right of nomination was limited, by the grant, to the heirs male of E., with limitation over in default of such heirs; that the eldest son of E. had three sons, that plaintiff was lineally descended from the third, but that in 1634 the two elder sons

were living, and one had then living male issue. No further evidence was then given.

Held, that, on the issue directed, plaintiff might recover upon this evidence without shewing that the two elder branches were extinct.—*Sandys v. Sandys*, 1 Ad. & E. (N. S.) 316, note.

FINES AND RECOVERIES.

(*Acknowledgment of married women.*) The two commissioners who take the acknowledgment of a married woman under the Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 82, must be commissioners appointed for the same district.—*Ex parte Webster*, 1 D. P. C. (N. S.) 678.

FOREIGN ATTACHMENT. See PROCESS, 3.

FOREIGN JUDGMENT. See AMENDMENT.

FRAUDS, STATUTE OF.

1. (*Acceptance of goods.*) Goods of the plaintiff being in defendant's hands, for the purpose of being sold by defendant for plaintiff, defendant told plaintiff that he, defendant, would take them himself at the price she named. Defendant afterwards sold them to a third party, and after that, in a written account current delivered to plaintiff, debited himself with the price of the goods as "sold," not adding to or deducting from them.

Held, that under sect. 17 of the Statute of Frauds, 29 Car. 2, c. 3, this was evidence upon which a jury might infer, as against defendant, a contract for the sale of the goods by plaintiff to defendant, and an acceptance by defendant under such contract.—*Edan v. Dudfield*, 1 Ad. & E. (N. S.) 304.

2. (*Interest in land—Growing fruit.*) An agreement for the sale of growing fruit is an agreement for the sale of an interest in land, and if of the value of 20l. requires a stamp. (6 East, 602; 5 B. & C. 829; 10 Ad. & E. 753.)—*Rodwell v. Phillips*, 9 M. & W. 501.

FREIGHT.

(*Liability of consignee for, where there is a charter-party—Effect of acceptance of bill of lading.*) Where a ship was chartered by agreement not under seal, for a voyage from a foreign port to England, to load at the foreign port a cargo, and deliver the same, on being paid a specified freight, half in cash and half in bills, and a bill of lading was signed to deliver goods to the charterer or his assigns, he or they paying freight for the same as per charter-party: Held, that an acceptance under the bill of lading of the goods by an assignee of it did not raise an inference in law of a contract by him to pay freight. But notwithstanding the charter-party, such acceptance would be evidence to a jury of a contract to pay freight.

Quære, whether indebitatus assumpsit for freight is the proper form of declaring on such an implied contract. (13 East, 399; 1 M. & Selw. 157; 2 M. & Selw. 318.)—*Sanders v. Vanseller*, 2 G. & D. 244.

GAME ACTS. See JUSTICES OF THE PEACE.

HABEAS CORPUS.

(*For what purpose grantable.*) The Court refused to grant a writ of habeas corpus to bring up a person in custody under an attachment, in order to enable him to move in person to set it aside.—*Ford v. Nassau*, 1 D. P. C. (N. S.) 691.

HORSE RACE.

1. (*Construction of conditions of.*) A race was run subject to certain conditions, one of which was that the riders should be "gentlemen farmers or tradesmen, being persons never having ridden as regular jockeys or paid riders;" another that the decision of the committee on any dispute that might arise should be final. At the trial it appeared that the rider of the plaintiff's horse, which came first to the winning-chair, had been in the habit of riding at races, sometimes receiving his expenses, but never having been paid for his services; and that the plaintiff's right to the stakes was disputed on the ground of an alleged cross, on the subject of which the committee had heard evidence, and intimated an opinion adverse to the plaintiff, but had come to no final decision:—Held, that the plaintiff's horse was not disqualified, nor the plaintiff, under the circumstances, disentitled to maintain the action.

Semle, that the pendency of the matter before the committee, and the absence of a decision thereon by them, if an answer to the plaintiff's right to recover under special contract, should be pleaded specially.—*Wulmsley v. Matthews*, 3 Scott, N. R. 584.

2. (*When legal.*) A wager of 25*l.* aside, on a trotting match, to be trotted along a turnpike road, is legal, under the 18 Geo. 2, c. 34, s. 11; a party, therefore, who, according to the terms of the wager, has forfeited his deposit money placed in the hands of a stakeholder, cannot recover it back from him. (4 Burr. 2432; 2 Bos. & P. 51; 2 M. & W. 369; 1 D. P. C. (N. S.) 505.)—*Challand v. Bray*, 1 D. P. C. (N. S.) 783.

INCLOSURE.

1. (*Title to allotments before award made—Saving clause—Right of sporting over allotments.*) To an action of trespass for breaking and entering the plaintiff's close, defendant pleaded that by a local inclosure act (52 Geo. 3, cc. x. xvi.) reciting that one W. P. P. was lord of the manor of M., and as such was seised of or entitled to the soil of the moor or common and waste lands, and to all the mines, minerals, quarries, and royalties in and under the same; and that the said W. P. P. and several individuals named, and others, were respectively owners and proprietors of messuages, inclosed lands, and tenements, within the manor and parish, and reciting the general Inclosure Act, 41 Geo. 3, c. 109, it is enacted, amongst other things, that the said moor or common called M. Moor, and all the wastes and other commonable lands within the manor and parish of M. should be divided, set out, and allotted by certain commissioners, that the commissioners should set out, allot, and award unto and for the said W. P. P., his heirs and assigns, (over and above and exclusive of such shares and allotments of and in the said moor or common as should, in pursuance of that act, be allotted to him or them in lieu of his or their rights of common) one full eighteenth part in value of the said moor or common and waste lands thereby directed to be divided, in full compensation and satisfaction of and for his and their right to the soil of the said moor or common and waste lands, except as thereafter was reserved to him; and after setting out certain roads, &c., should set out, divide, and allot the residue of the moor or common wastes and commonable lands thereby directed to be divided and allotted, unto and amongst the several proprietors of such ancient messuages, &c., in M., who in respect thereof were entitled to rights of common, in, over, or upon the said commonable lands; which allotments were to be taken by the several persons entitled thereto, in lieu, full bar, and compensation and satisfaction of and for their several and respective

rights of common and other rights and interests in and over the common, moor, and waste lands, with power to the allottees to convey and dispose of their respective interests at any time before the execution of the award of the commissioners, with a proviso that nothing in the act contained should be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of W. P. P., his heirs and assigns, or any of them, of, in, and to the seignior and royalties incident and belonging to the said manor respectively, but that the said W. P. P. his heirs and assigns, and all succeeding lords of the said manor for the time being, should and might from time to time and at all times thereafter have, hold, and enjoy all courts, &c., fairs, markets, tolls, stallage, rights, royalties, with free warren, and liberty of hunting, hawking, fishing, fowling, &c., to the said manor, or to the lord or lords thereof for the time being, incident, belonging, or appertaining, in as full, ample, and beneficial a manner to all intents and purposes as he or they or they could or might have enjoyed the same if that act had not been made. The plea then proceeded to state, that the commissioners under the act did set out and allot unto and for the said W. P. P., his heirs and assigns (over and above and exclusive of such shares and allotments of and in the said moor or common as were in the pursuance of the local act allotted to him and them, in lieu of his and their rights of common) one full eighteenth part in value of the said moor or common and waste lands, in full compensation and satisfaction of and for his and their right to the soil of the said moor, &c., except as was thereby reserved to him as thereinbefore mentioned; that the locus in quo was duly allotted under the act to one Ince, "who took possession of and occupied the said close in which, &c., in severalty under and by virtue of the said allotment and division; and that from the time of such allotment, until and at the same time when, &c., the said close in which, &c., had been possessed and occupied in severalty by Ince and the plaintiff, and those claiming under Ince," under and by virtue of the said allotment; and that W. P. P. being seised in fee of the manor of M., together with the rights, royalties, members, and appurtenances thereunto appertaining, conveyed the manor, &c., to the father of one of the defendants, to whom the same descended: and it then proceeded to justify the entering of the close by one of the defendants, as lord of the manor, (and by the others as his servants, and by his command) in exercise of a right of hunting and fowling therein:—Held, first, that the plea showed such an exclusive right in the plaintiff as to entitle him to maintain trespass: Secondly, that the right of hunting or fowling over the allotments of the moor or common was not reserved to the lord of the manor by the saving clause in the local act, such right not being a mere license or liberty incident to him as lord, but a mode of direct enjoyment of his own property.—*Greathead v. Morley*, 3 Scott, N. R. 538.

2. (*Exchange of old inclosures, under 6 & 7 W. 4, c. 115, when complete.*) Certain waste lands being about to be enclosed by agreement under 6 & 7 W. 4, c. 115, A. & B., proprietors of land in the parish, signed and sent to the commissioners consents to exchange certain old inclosures referred to by numbers on a certain map or plan. The commissioner thereupon prepared and signed a scheme or arrangement, specifying the particular lands to be exchanged, and A. and B. respectively took possession of the several lands by that scheme assigned to them in exchange; but no other consent was given, and no award had been made: Held that A. (who had given notice to the commissioner that his consent had been given under a misapprehension as to one of the closes therein mentioned) had not so parted with his right as to prevent his maintaining ejectment against B. for the close in question.—*Doe d. Duke of Beaufort v. Neeld*, 3 Scott, N. R. 618.

INSOLVENT.

1. (*Rights of insolvent assignee, and execution creditor.*) Judgment was obtained against defendant, a pawnbroker, on a warrant of attorney, and a seizure was made under a *fi. fa.* An action being brought against defendant after the seizure, he was taken under a *ca. sa.* in that action, and afterwards discharged by the Insolvent Debtor's Court. The sheriff had realized money on the seizure, partly from the sale of the defendant's goods, and partly by the redemption of pledges since the seizure. The insolvent's assignee claimed under stat. 1 & 2 Vict. c. 110, s. 61, the monies so realized, both before and after the imprisonment commenced.

Ordered, that the sheriff should pay the execution creditor the monies realized before the imprisonment commenced, and the remainder to the assignee.—*Squire v. Huetson*, 1 Ad. & E. (N. S.) 308.

2. (*Re-arrest of, after remand.*) Where a defendant has been conditionally discharged under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 84, and is again arrested under a writ of *capias*, issued pursuant to the 85th section of the same act, it is not necessary that a judge's order should have been taken out for the defendant's arrest, under the 3rd section of the act.—*Bilton v. Clapperton*, 9 M. & W. 473.

And see PLEADING, 9.

INSURANCE.

- (*General average—Jettison—Deck cargo.*) Declaration, by ship owners against underwriter of a time policy upon the hull and stores, that on a certain voyage certain pigs were shipped on board the vessel, and that, from stress of weather, it became necessary for the preservation of the vessel and her cargo to throw the pigs over board, by reason whereof the plaintiffs, in respect of their interest in the hull, had to pay a proportionable part of the value of the pigs, and sustained a general average loss.

Plea, that the pigs so thrown overboard had been stowed on deck, according to the usage of the shipping trade between Waterford and London.

On special demurrer to the replication, on the ground that it did not allege that the defendant had notice of the custom: Held, that the plea itself was bad, as the mere fact of stowing the pigs on deck was no answer to the action. (1 Campb. 142; 4 Bing. N. C. 134; Park. Ins. 26; Abbott on Sh. 428.)—*Milward v. Hibbert*, 2 G. & D. 142.

INTERPLEADER ACT.

- (*Jurisdiction as to costs of rules at chambers.*) Where an application for an interpleader rule is made to a judge at chambers, pursuant to the stat. 1 & 2 Vict. c. 45, s. 2, a judge at chambers only, and not the court, has authority as to the costs of the proceedings.—*Burgh v. Schofield*, 9 M. & W. 478.

JETTISON. See INSURANCE.

JOINT STOCK COMPANY.

1. (*Liability of shareholders in mining company—Foreign law.*) A joint stock company was formed for the working of mines in the Brazils. The prospectus stated that the capital was to be 100,000*l.*, in 5000 shares of 20*l.* each: and the first annual report stated that the whole number of shares had been appropriated, which was contrary to the fact, the number really disposed of being only 2000, and the other 3000 having been colourably divided among the directors them-

selves, some of whom had not paid the deposit thereon, while others had given their acceptances for the amount. The defendant was a shareholder, and was proved to have called several times at the office of the company for information, and to have attended a meeting of the shareholders: Held, that notwithstanding the nonfulfilment by the directors of the terms on which the defendant originally agreed to become a partner in the concern, inasmuch as he had knowledge or means of knowledge of the facts, and made no objection, the jury were warranted in inferring that he assented to the course pursued by the directors, and consequently that he was liable on contracts entered into by them for the working of the mine. (5 M. & W. 2; 6 M. & W. 461; 8 M. & W. 703.)

Held, also, that in the absence of evidence to the contrary, the Court would assume that an interest in the mines was duly conveyed to the company according to the Brazilian law.—*Strigenberger v. Carr*, 3 Scott, N. R. 466.

2. (*By whom to be sued—Issuable plea.*) Where a statute empowered a joint stock company to sue and be sued in the name of the secretary or one of the directors: it was held, that, under the provisions of the act, it was not imperative on the plaintiff to sue the nominal defendant; and that, therefore, a plea to an action brought against a member of the company, alleging that it was brought for a debt of the company, and that the defendant was not secretary or director, was not an issuable plea.—*Blewitt v. Gordon*, 1 D. P. C. (N. S.) 815.

JOINT STOCK BANKING COMPANY.

(*Execution against.*) Where judgment has been obtained against the public officer of a banking company, sued on their behalf under stat. 7 Geo. 4, c. 46. s. 9, the proper mode of proceeding to execution against a partner, not being such officer, is by *scire facias*, not suggestion. (11 Ad. & E. 520; 6 M. & W. 217; 6 Bing. N. C. 345.) So held by the Exchequer Chamber, on writ of error.

And where, by leave of the Court of Queen's Bench, after judgment against the public officer, a suggestion had been placed on the record that A. and B. were partners in the company, and an award of execution had been thereupon entered against A. and B., the Court of Error reversed the judgment as to the award of execution, affirming the rest.—*Ransford v. Bosanquet*, 12 Ad. & E. 813.

JUDGMENT.

(*Operation of 1 & 2 Vict. c. 110, s. 18.*) By rule of Court, the costs of an attorney against his client were referred to taxation by the master, on the usual undertaking to pay what should be found due. The master having made his allocatur, and the money not having been paid, the Court made an order that the client should pay the money, but the attorney should abandon his right to move for an attachment; the purpose for applying for such order being that the attorney might become a judgment creditor under stat. 1 & 2 Vict. c. 110, s. 18. (11 Ad. & E. 175.)—*Neale v. Postlethwaite*, 1 Ad. & E. (N. S.) 243.

JURY.

(*Mistrial—Wrong juror.*) Where A. B. the elder being summoned on a special jury, A. B. the younger, of the same place, by mistake answered to the name, was sworn, and sat as a special juror on the trial of a cause; the Court, in its discretion, refused a new trial, after verdict for the plaintiff, it appearing that the defendant's attorney's clerk was aware of the mistake at the time of the trial, and made no objection, and the attorney himself not negating his knowledge of the mistake.—*Earl of Falmouth v. Roberts*, 9 M. & W. 469; 1 D. P. C. (N. S.) 633.

JUSTICES OF THE PEACE.

(*Trespass, when maintainable against, after conviction quashed—Game acts.*) The 49 Geo. 3, c. 141, s. 1, which enacts that in all actions against a magistrate "on account of any conviction, in case such conviction shall have been quashed, the plaintiff, besides the amount of any penalty which may have been levied, shall not be entitled to recover more than 2*l.*, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action, and which shall be an action on the case only, that such acts were done maliciously, and without any reasonable and probable cause," does not protect a convicting magistrate from an action of trespass, although his conviction has been quashed, where he has acted without jurisdiction. (12 East, 67.)

Where the convicting magistrate, under 52 Geo. 3, c. 93, sched. (L), rule 13, which authorizes a magistrate, on information or complaint to him, to proceed to hear the same, was not the same magistrate who took the information: Held, that he had acted without jurisdiction, and was liable in trespass, although his conviction had been quashed on appeal.—*Jones v. Gurdon*, 2 G. & D. 133.

LANDLORD AND TENANT.

1. (*Right of tenant to remove trees.*) A tenant, who plants fruit or other trees for the purpose of his trade of a nurseryman, may remove them at the expiration of his term, provided they be not too aged for transplanting.—*Wardell v. Usher*, 3 Scott, N. R. 508.

2. (*Determination of estate at will—Evidence of contract for tenancy at will.*) A., in 1817, let B. into possession of a farm as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom: Held, on error in the Exchequer Chamber, that this entry amounted to a determination of the estate at will. (7 M. & W. 226.)

In 1829, B., being one of the assessors for the land tax in the parish, signed an assessment, in which he was named as the occupier of the farm, and B. as the proprietor: Held, that this was evidence whence the jury might infer that a new tenancy at will had been created between the parties.—*Turner v. Doe d. Bennett*, 9 M. & W. 643.

And see PLEADING, 10; TROVER.

LEASE.

(*By corporation, how to be sued on—Signing, when necessary.*) A declaration in covenant by A., B. and C., stated that by indenture they demised certain premises to the defendant for a term, and that the defendant covenanted to yield up the premises in good repair at the end of the term. Breach, that at the end of the term he yielded up the premises out of repair. The defendant on oyer set out the indenture, which appeared to be made between A. the master, and B. and C. the governors, of an hospital, of the one part, and the defendant on the other part. It stated that the "masters and governors" had demised the premises to the defendant, and that the covenant in question was made with the "said master and governors, and their successors;" and it also contained covenants by the "said master and governors, for themselves and their successors," and concluded thus, "In witness whereof the said masters and governors have hereunto affixed their common seal." A seal purporting to be a common seal was affixed on the part of the lessors, and the deed purported to have been signed, sealed, and delivered by the defendant.

The defendant then pleaded that the indenture was not signed by the plaintiffs

or their agent lawfully authorized by writing, and that there was no demise of the premises signed by them or their agent lawfully authorized by writing. Special demurrer to the plea, on the ground that it was an argumentative denial of the plaintiff's right of action, and of the validity of the indenture of demise.

Held, that it appeared by the record that the lease was made by a corporation, and that no action could be maintained upon it in the names of the plaintiffs.

That, though the names of the members of the corporation were mentioned in the indenture, those persons as individuals could not be considered as parties to it, because, independently of the form of the covenants and the concluding clause, "in cujus rei testimonium," the seal professed to be the seal not of individuals, but of a corporation. (2 B. & Adol. 822; 2 M. & W. 111.)

Semble, that if the plaintiffs, as individuals, had appeared to be parties to the indenture, the want of execution by them would have been no answer to the action.

Quere, whether it is necessary, by the statute of frauds, that a lease under seal, for more than three years, should also be signed. (2 M. & W. 111; 4 T. R. 313.)—*Cooch v. Goodman*, 2 G. & D. 159.

And see EXECUTOR AND ADMINISTRATOR; TROVER.

LIMITATIONS, STATUTE OF.

1. (*When it begins to run—Conditional promise.*) The defendant, being indebted to plaintiff on two overdue bills of exchange, gave the following undertaking: "In consideration of your not proceeding on the bills, I hereby debar myself of the statute of limitations in case of my being sued for the recovery of the amounts of said bills; and I hereby promise to pay them whenever my circumstances enable me to do so, and I may be called upon for that purpose." In an action on the agreement, where issue was joined on a plea of the statute of limitations: Held, that the statute of limitations began to run as soon as the defendant became of ability to pay, although the plaintiff had had no notice or knowledge of such ability, and had made no demand of payment. (1 Mod. 89; Selw. N. P. 352; 2 M. & W. 461.)—*Waters v. Earl of Thanet*, 2 G. & D. 166.
2. (*Evidence of part payment—Indorsement on promissory note.*) In an action on a promissory note by the payee against the maker, the note, when produced in evidence by the plaintiff at the trial, bore upon it an indorsement as follows: "4th Aug. 1837,—Received of J. S. 6*l.*—B. × E." The whole of this entry, except the cross, was in the handwriting of the defendant, and there was no attestation, nor any proof that the cross was the mark of B. E., nor any proof of the fact of payment: Held, that the indorsement was not evidence of part payment, to take the case out of the statute of limitations. (4 P. & D. 204.—*Eastwood v. Saville*, 9 M. & W. 615.
3. (*Acknowledgment, when sufficient—Pleading—Imperfect issue—Repleader.*)—Debt on a bill of exchange by payee against acceptor for 20*l.* Pleas, first, except as to 10*l.* 1*l.*s., parcel, &c., a set-off for board and lodging; and as to the sum of 10*l.* 1*l.*s., payment of that sum into Court. Replication, that the alleged debts and causes of set-off did not accrue within six years before the commencement of the suit, concluding to the country; to which the defendant, by his rejoinder, added the similer. At the trial, the plaintiff having proved his case, and the defendant his set-off, the latter put in a letter from the plaintiff to the defendant, in which the following passages were relied upon, to take the case out of the sta-

tute: "Before closing this, I have to request you will be pleased to send me in any bill or what demand you have to make on me, and *if just*, I shall not give you the trouble of going to law. If you refer to your books, you will find the *last payment* I made you was in May, 1839; the day I have forgot. I shall leave town to-morrow, but shall be back in a few days, for a month, and if you will *bring my bill* in here to me by eleven I shall be at your service." Held, that this was not a sufficient admission to take the case out of the statute of limitations. (3 M. & W. 402; 1 Y. & C. 238.)

Held, also, that the issue joined on the replication of the statute of limitations was no proper issue, and that there ought to be a replender. (1 M. & W. 533.)—*Spong v. Wright*, 9 M. & W. 629.

And see **BILLS AND NOTES**, 5; **PLEADING**, 16.

LUNATIC.

(*Settlement of insane pauper—Notice of appeal.*) The notice of appeal against the order of justices, adjudicating on the settlement of an insane pauper, under 9 Geo. 4, c. 40, s. 42, should be given to the clerk of the peace under section 54, and not under section 46, to the justices who made the order.—*Reg. v. Justices of Kent*, 2 G. & D. 152.

MANDAMUS.

1. (*To corporation to pay money recovered by a judgment—Mandamus to make calls.*) By a statute (7 Will. 4 & 1 Vict. c. xxx.) a company was established, with a power to make calls, and to sue and be sued in the name of their treasurer or any director. An action was brought against the treasurer, and judgment entered up against the company, who appeared to have no assets. The Court refused to issue a mandamus commanding the company to pay the sum recovered and costs. The Court also refused to issue a mandamus requiring the company to make calls to enable them to satisfy the debt, it appearing that calls sufficient to satisfy the judgment had been made but not paid, and that the company had not now the proper officers for making such calls. *Quære*, whether if the circumstances had not appeared, a mandamus would have gone commanding the company to make the calls.—*Reg. v. Victoria Park Company*, 1 Ad. & E. (N. S.) 288.
2. (*Costs—Practice.*) On motion for costs of mandamus, the prosecutor cannot refer to affidavits used by him in applying for the mandamus, unless the rule for costs be drawn up on reading such affidavits.—*Reg. v. Master, &c. of Peterhouse*, 1 Ad. & E. (N. S.) 314.
3. (*Costs.*) On a concilium upon a return to a writ of mandamus commanding the defendants to seal a bond for the amount of compensation to the prosecutor, awarded to him by the lords of the treasury, under the statute 5 & 6 Will. 4, c. 76, s. 66, on the abolition of an office, the Court held the writ bad, because it appeared on it that the lords of the treasury had no jurisdiction, the defendants having disputed not only the amount of compensation, but the right to any compensation: Held, that the Court ought to give the costs of the writ to the defendants. (10 Ad. & E. 374, 386.)—*Reg. v. Mayor of Newbury*, 2 G. & D. 109.

And see **COPYHOLD**, 1; **CORPORATION**, 1; **TITHE COMMUTATION ACT**.

MINE. See **JOINT STOCK COMPANY**, 1; **TRESPASS**, 2.

MONEY HAD AND RECEIVED.**1. (When maintainable for excess paid to redeem goods—Tender, when necessary.)**

The defendants carried goods for the plaintiffs, and lodged them in their warehouse. The plaintiff, conceiving that they had agreed to charge nothing for the carriage, claimed to receive them without paying for it. The defendants made a charge of 5*l.* 5*s.* The plaintiff applied again, and on the same charge being made, stated that he considered it to be exorbitant, and also that he did not consider himself liable to pay anything. He afterwards applied a third time, and asked whether defendants persisted in detaining the goods until the whole charge was paid; and on their answering that they did, he paid it under protest; he then brought assumpsit for money had and received, stating in his particulars that the action was brought to recover 5*l.* 5*s.* paid to recover his goods, and which sum was paid under protest that he was not liable to pay the same, or any part thereof, or if liable to some part, that 5*l.* 5*s.* was an exorbitant charge. The jury found that the defendants were entitled to 1*l.* 10*s.* 6*d.* for the carriage.

Held, that under the circumstance, with reference especially to the defendants insisting on the entire charge of 5*l.* 5*s.*, that the action lay for the overcharge, although the plaintiff had made no tender of the sum really due. (*Cowp.* 414; 2 *Stra.* 915; 1 *Esp.* 84; 2 *B. & Ald.* 562; 5 *Bing.* 37; 3 *M. & W.* 633; 7 *M. & W.* 288; 3 *P. & D.* 597.)—*Ashmole v. Wainwright*, 2 *G. & D.* 217.

2. (Appropriation of fund in hands of agent, when revocable—Stamp.)

The plaintiff sold goods to B., taking his acceptances for the price, and sent them to the defendant as B.'s agent, who consigned them to his partners abroad for sale. While the acceptances were running, the plaintiff, doubting B.'s solvency, required further security; whereupon it was agreed between the plaintiff, B., and the defendant, that B. should write and deliver to the defendant a letter authorizing him, out of any remittances he might receive against the net proceeds of the above consignments, to pay the acceptances as they became due, if not honoured by him, B., previously to the receipt of such net proceeds. The letter was accordingly delivered to the defendant, and he assented to the terms of it. Before the bills were due, B. became bankrupt, and the defendant, having received the net proceeds of the goods, refused to pay any part thereof to the plaintiff, but handed them over to B.'s assignees: Held, that the plaintiff was entitled to recover the amount of the acceptances from the defendant in an action for money had and received; this being an appropriation irrevocable except by the consent of all parties, for which the existing debt, although not then payable, was a good consideration. (4 *B. & Adol.* 382; 9 *Ad. & E.* 375; 9 *Bing.* 372; 7 *Sim.* 109.)

Held, also, that the letter did not require a stamp, either as an inland bill or as an agreement.—*Walker v. Rostren*, 9 *M. & W.* 411.

And see **ACCORD AND SATISFACTION.**

MORTGAGE. See **STAMP**, 1.

MUNICIPAL CORPORATION ACTS.**(Disqualification of town councillor—Contract with the council, what amounts to.)**

A lease by the mayor, aldermen, and burgesses, whether made before or after the passing of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76), is a contract by or with the council, within the 28th section, and disqualifies the lessee for the office of town councillor. (10 *Ad. & E.* 286.)—*Reg. v. York*, 2 *G. & D.* 105. [But see now 5 & 6 *Vict.* c. 104, abstracted post, p. 501.]

ORDER OF FILIATION.

(*Appeal, when it lies.*) Where an order of maintenance on the putative father of a bastard has been duly made at petty sessions under stat. 2 & 3 Vict. c. 85, s. 1, the party charged not requiring the original charge to be heard at quarter sessions, under sect. 3, no appeal from such order lies to quarter sessions under 4 & 5 Will. 4, c. 76, s. 103.

If the party charged require the cause to be originally heard at quarter sessions, no appeal lies from the order made by quarter sessions, on such hearing, to another quarter sessions.—*Reg. v. Justices of West Riding, in re Lees*, 1 Ad. & E. (N.S.) 325.

ORDER OF REMOVAL.

(*Notice of grounds of appeal, construction of—Appeal—Onus probandi.*) Pauper was removed to the appellant parish on his examination, at which he produced an indenture of apprenticeship, and swore to its execution, and that the consideration was 15*l.*, and that he was bound under it to C., that he was then fifteen years of age, and that he served the time in the appellant parish. The appellant gave notice of appeal, on the ground that the pauper did not acquire a settlement in the appellant parish, by reason of his being bound an apprentice by indenture, dated, &c., and by serving, &c., because the premium of 15*l.* was paid by the parish officers, and not by the pauper's father, and that the requisition of the statute (56 Geo. 3, c. 189), "made for the regulation and binding of parish apprentices then in force had not been complied with." On trial of the appeal, the sessions held that the execution of the indenture was not admitted by the notice of grounds of appeal, and that the respondents were bound to begin by proving their case; which not being done, they quashed the order, subject to a case which provided that the order of sessions, if the sessions were wrong, was to be quashed, and the appeal reheard.

This Court, holding that the execution of the indenture was admitted, and that the appellants ought to have begun by establishing their objection, quashed the order of sessions, but did not send the case back to be reheard.—*Reg. v. Inhabitants of St. John, Margate*, 1 Ad. & E. (N.S.) 252.

OVERSEER. See POOR RATE, 2.

PARTICULARS OF DEMAND.

Where a plaintiff, in his particulars of demand, made charges subsequent to action brought, but gave credit also to the defendant for payments made after action brought, it was held to be no misdirection on the part of the judge, that the jury should find for the balance, the defendant not having objected to the mode in which the plaintiff stated his particulars, until during the summing up.—*Alexander v. Porter*, 1 D. P. C. (N.S.) 832.

And see PLEADING, 1.

PARTNERSHIP. See BILLS AND NOTES, 2.

PERJURY. See AFFIDAVIT, 1.

PLEADING.

1. (*Plea of payment—Effect of credit given in particulars—Set-off.*) The general rule of Trin. 1 Vict. that defendant need not plead payment of any sums for the payment of which credit is given in plaintiff's particulars of demand, does not apply to set-off. Plaintiff in assumpsit claimed a balance, which was made out

in his particulars of demand by showing claims against defendant, and admitting counter claims (to a less amount) in the nature of set-off. Defendant pleaded a set-off, which plaintiff traversed. At the trial, plaintiff proved sums due to the amount of his balance claimed; but the set-off admitted by the particulars exceeded that amount: held that if defendant used the particulars as evidence in support of his plea of set-off, plaintiff became thereby entitled to have the whole submitted to the jury, as evidence to the total amount of claims on each side.

But where payments are admitted in plaintiff's particulars, he can recover only for the amount by which the claims proved by his witnesses exceed such payments.—*Rowland v. Blakley*, 1 Ad. & E. (N. S.) 403.

2. (*Several pleas—Rule to add pleas, form of.*) A rule to show cause why pleas should not be added to those already pleaded, need not be drawn up on the reading the rule to plead several matters, or the judge's order upon which that rule was drawn up.—*Smith v. Goldsworthy*, 2 G. & D. 189.
3. (*Demurrer for duplicity, form of.*) A special demurrer for duplicity must point out in what the duplicity consists. (1 Salk. 219; 1 Saund. 337 b, n. (3).) —*Smith v. Clinch*, 2 G. & D. 225.
4. (*Assumpsit—Statement of consideration—Agreement—Proviso.*) An agreement between the defendant who was executor, and the plaintiff, who was the widow of a testator, recited that the testator had verbally declared his desire that his widow should have his dwelling house, and then proceeded thus, "Now these presents witness, and it is hereby agreed and declared, that in consideration of such desire" the defendant would convey the dwelling-house to the plaintiff; "provided nevertheless, and it is hereby further agreed and declared, that the said executrix (the plaintiff) shall pay to, &c. (the defendant) the sum of 1l. yearly, towards the ground-rent payable in respect of the said dwelling-house and other premises thereto adjoining, and will keep the said dwelling-house and premises in good and tenantable repair." Held, that the stipulation as to the payment of ground-rent and the repair was not a mere proviso, and that it contained the real consideration for the defendant's promise to convey the dwelling-house.
That the consideration was good, because the 1l. being payable for the house and other premises also, and payable to the defendant himself, did not appear to be incident to the house as a specific burden, for which the defendant was liable to any superior landlord, and so to be a mere diminution of the gift itself; and that in declaring upon the agreement, the reference to the testator's desire was properly omitted, as being irrelevant to the consideration. (6 B. & Cr. 251.)—*Thomas v. Thomas*, 2 G. & D. 226.
5. (*Action on contract of indemnity.*) A declaration on an undertaking to indemnify and save harmless the plaintiff from all actions, &c. which might be brought by one C. for or in respect of rent *then due or to become due* for certain premises, stated that C. sued the plaintiff for rent *claimed to be due* for the occupation of the premises, for a certain time then elapsed, and that the plaintiff was forced and obliged to pay the same, and that the defendant had not indemnified him: Held bad on general demurrer.—*Lesenbery v. Evans*, 3 Scott, N. R. 476.
6. (*Judgment for want of a plea.*) To an action of debt, the defendant, under a rule to plead *nunquam indebitatus* and two other pleas, by mistake pleaded *non-assumpsit* with the other two pleas, whereupon the plaintiff signed judgment.

The Court set the judgment aside for irregularity.—*Holliday v. Bohn*, 3 Scott, N. R. 496.

7. (*Issuable pleas.*) Where to an action of covenant on an indenture of apprenticeship against the father, for breaches by the apprentice, the defendant, being under terms of pleading issuably, pleaded that the plaintiffs carried on the business of engineers as co-partners, that the covenants were made with them as such co-partners, and that before any breach of duty, they dissolved partnership: Held, that the plea was an issuable one, and ought not to be set aside.—*Lloyd v. Blackburn*, 9 M. & W. 363; 1 D. P. C. (N. S.) 647.
8. (*Duplicity—Argumentative traverse.*) Declaration in assumpsit, stating that the plaintiff had recovered in an action against R. S. the sum of 3000*l.* and had sued out a ca. sa. under which R. S. had been taken in execution, alleged, that in consideration that the plaintiff would procure the release of R. S. from custody, the defendant promised to pay him 500*l.* Averment, that the plaintiff did procure the release of R. S. from custody. Breach, in non-payment of the 500*l.*
 The defendant pleaded as follows:—1st. That R. S. was a member of the House of Commons, and entitled to privilege of parliament and freedom from arrest; that his release from custody was only on the ground of his being so privileged; that he afterwards ceased to be a member of the house, and became and still is liable to be taken in execution at the suit of the plaintiff; that the promise of the defendant was a promise to answer for the debt of another, and that there was no memorandum in writing thereof.
 2nd. That R. S. at the time of his becoming indebted to the plaintiff was a member of the Commons House of Parliament, and that whilst he continued such member, the plaintiff recovered judgment and issued a ca. sa., under which he was taken into custody; that R. S. was, as such member, entitled to his discharge from arrest, and that during the continuance of his privilege, a judge ordered his discharge out of custody, and he was discharged accordingly; and that, save as aforesaid, there never was any consideration for the defendant's promise: Held, on special demurrer, that the first plea was bad for duplicity, and the second as being an argumentative traverse of the allegation in the declaration, that the plaintiff had procured the release of R. S. from custody.—*Butcher v. Stewart*, 9 M. & W. 405; 1 D. P. C. (N. S.) 620.
9. (*Issuable pleas.*) To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, first, that before and at the time of the indorsing of the bill by the drawer, he, the drawer, was indebted to the defendant in a sum of money exceeding the amount of the bill: and that after the bill became due, in order to deprive the defendant of his right to set-off in respect of the debt, he fraudulently indorsed the bill, to enable the plaintiff to sue the defendant on the bill, and without any consideration for the indorsement. The defendant pleaded, secondly, that the drawer, before he indorsed the bill, petitioned for relief under the Insolvent Debtors Act, whereby the right and title to the bill vested in his assignees: Held, that both were issuable pleas. (5 Scott, 432; 4 Bing. N. C. 714.)—*Watkins v. Bensusan*, 9 M. & W. 422; 1 D. P. C. (N. S.) 615.
10. (*Several counts.*) Where the defendant took possession of premises under a demise for three years from Christmas, 1839, and continued to occupy them until the 27th of July 1841, when he quitted them, having paid rent to the Midsummer previous: Held, in an action brought to recover the rent which subsequently accrued due, that the plaintiff was not entitled to have a count on the

demise, and also a count for use and occupation, but that he must make his election.—*Arden v. Pullen*, 8 M. & W. 430; 1 D. P. C. (N. S.) 612.

11. (*Issuable pleas—Commencement.*) To a declaration in debt against executors, containing a count for non-payment of money due on a covenant of the testator, with counts for money paid and on an account stated, the defendants, being under terms of pleading issuably, pleaded, 1st, that "the writing in the declaration mentioned" was not the deed of the testator; 2nd, that "the said writing in the declaration mentioned" was executed for an immoral consideration: Held, that these were not issuable pleas, being in form pleaded to the whole declaration, whereas they applied to the first count only.—*Parratt v. Goddard*, 9 M. & W. 458.
12. (*Not guilty in case, effect of.*) In case, for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated.—*Norton v. Scholfield*, 9 M. & W. 664; 1 D. P. C. (N. S.) 638.
13. (*Bad grammar, how far it vitiates.*) Declaration in assumpsit described the defendant as "Mary T.," and alleged that the defendant had disregarded her promises, &c. The plea commenced—"And the defendant, by B. his attorney," &c., continuing to use the masculine pronoun: Held, no ground for a special demurrer.—*Mabon v. Townsend*, 1 D. P. C. (N. S.) 634.
14. (*Venire de novo, when granted.*) Where in debt on simple contract the declaration contains good and bad counts, and nominal damages are assessed on the whole, the Court will award a venire de novo, not arrest the judgment. (2 M. & W. 427; 6 D. P. C. 690.)—*Lewin v. Edwards*, 1 D. P. C. (N. S.) 639.
15. (*Declaration in case against sheriff for removing goods without payment of rent.*) Declaration in case against the sheriff for removing goods taken in execution without satisfying arrears of rent due to the plaintiff, stated, that on the 25th Dec. 1841, K. held certain premises as tenant to the plaintiff; that on the day aforesaid a sum of money was due for rent, and thereupon afterwards the defendant being sheriff, &c., by virtue of a fi. fa. took certain goods then being on the said premises so in the tenure and occupation of K. as aforesaid, &c. &c.: Held bad, on special demurrer, as not showing a tenancy subsisting at the time of the execution, or of the removal.—*Riseley v. Ryle*, 1 D. P. C. (N. S.) 660.
16. (*Counsel's signature.*) A plea of the statute of limitations, though it need not conclude with a verification, must nevertheless be signed by counsel. (1 C. M. & R. 577.)—*Roberts v. Howard*, 1 D. P. C. (N. S.) 667.
17. (*Variance—Statement of terms of tenancy.*) In covenant, the plaintiff sued on an indenture, by which defendant covenanted and agreed with him to procure him a license from the lord of the manor, in which a certain messuage, &c. then in the occupation of the plaintiff, was situated, to lease the same premises to the plaintiff, and to make to him a good and sufficient demise of the same; and the declaration alleged that it was thereby covenanted that the lease should contain a covenant, amongst other things, that pending the occupation by the plaintiff under the provisions of the said indenture, the defendant would, once in every three years, paint the outside of the messuage, and keep the same in good and tenantable repair; and that it was thereby also agreed that until the said license should be obtained and the lease granted, "the plaintiff should continue in possession of the premises as tenant from year to year, subject to the terms and conditions in the said indenture specified:" Breach, the non-repair of the premises during the continuance of the tenancy from year to year. The indenture, on its

production at the trial, contained a provision, that, "until the license should be obtained and the lease should be granted, the plaintiff should be considered to be tenant of the said premises at the rent and subject to the terms and conditions hereinbefore specified:" Held, that there was no variance between the allegation and the proof, but the declaration correctly stated the legal effect of the indenture.—*Price v. Birch*, 1 D. P. C. (N. S.) 720.

And see **BILLS AND NOTES, 7**; **JOINT-STOCK COMPANY, 2**; **LIMITATIONS, STATUTE OF, 3**.

POOR RATE.

1. (*Publication..*) Where a poor rate is made for a district within a parish, which district has its own church and maintains its own poor, the rate is sufficiently published under stat. 7 Will. 4 & 1 Vict. c. 45, s. 2, if notice of it be affixed on the door of such church, although there be chapelries within the parish having their own respective chapels, all which belong to the same vicarage with the church.—*Reg. v. Marriott*, 12 Ad. & E. 779.

2. (*Right of township to have several overseers.*) Two neighbouring divisions of a parish used the same parish church, situate in one of the divisions; but each had its own overseers, collectors of poor and county rates, surveyor of highways, and constable. Poor rates were made for the whole district, consisting of the two divisions, but were raised by each division separately; and one division always contributed in the proportion of two-thirds, the other of one-third. As far back as could be traced, the two divisions had relieved their poor jointly and indiscriminately; and for forty years they had had a joint workhouse. The residue of the parish consisted of five chapelries, each having its own chapel and parish officers, and maintaining its own poor.

On a special case, setting forth these facts, and referring it to the Court to draw such inferences from them as a jury might, and to decide whether P., one of the two divisions, was a separate and distinct township, as to the maintenance of its poor, within 13 & 14 Car. 2, c. 12, s. 21, and could have the benefit of stat. 43 Eliz. c. 2: the Court held, that it was not within the former statute, and that it could have the benefit of the latter.—*Price v. Quarrell*, 12 Ad. & E. 784.

3. (*Construction of local act—Distress against lodger—Action against constable—Demand of copy of warrant—Liability for excess.*) By a local act, 10 Geo. 3, c. 75, the 15th section enacted, that the rates directed by that act to be made should and might, on refusal or neglect to pay the same by any person or persons liable thereto, be recovered in such manner as the rates made for the relief of the poor are directed to be recovered; and by the 17th section it was provided, that any person, whether landlord or tenant, who should let out his or her house in separate apartments, or ready furnished to a lodger or lodgers, should be deemed to be the occupier thereof, and might be rated or assessed accordingly, and should be liable to the payment of the sum so rated. And sect. 18 enacted, that the goods and chattels of each and every person renting or occupying any separate part or apartment in such house or building, or renting or occupying any ready-furnished house, or any part thereof, should be liable to be distrained and sold for the payment of the said rates: Held, first, that under that act, the goods of a lodger are liable to be distrained and sold for rates assessed upon and due from the landlord, under a warrant directing the churchwardens and overseers to take the goods of the landlord.—The warrant recited that the rates were due from D., the landlord; that they had been lawfully demanded, and refused to be paid;

and that it had been fully proved to the justices on oath, that D. had been duly summoned before them to show cause why he had refused to pay the rates; but that he had not shown any sufficient cause: Held, in an action against the constable for seizing the goods, that it was not any objection that there was no proof that the landlord had been duly summoned.

Held, also, that the action could not be maintained against the constable for any thing done in the warrant, without a demand of a perusal and copy of the warrant, unless he were guilty of any excess; in which case he would be liable for such excess, without such a demand.

The constable, having entered the house of D. and there distrained the goods of a lodger, placed a person in possession of the goods in the room in which they were, saying, that unless the money were paid, he should remain there five days; he remained in possession eight hours, until the lodger paid the amount to redeem the goods: Held, that this was not an impounding, but that it was a question for the jury, whether he had remained an unreasonable time for the removal of the goods under the warrant.—*Peppercorn v. Hofman*, 9 M. & W. 618.

4. (*Under 11 Geo. 4, c. x.—Declaration in action against landlord for.*) In an action for the recovery of poor rates from the landlord of certain houses, under the provisions of the stat. 21 Geo. 4, c. x, (the local act for regulating the affairs of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury,) it is not necessary to aver in the declaration that the defendant was landlord at the time of notice of the rate, or the tenant's default in payment, or that there was no sufficient distress on the premises in respect of which the rate was made.—*Robinson v. James*, 1 D. P. C. (N. S.) 756.

POWER.

- (*Of leasing—Execution of.*) A power to demise premises with the consent of A. B., in writing, *duly attested*, is not well executed by a demise which professes to be made with the consent of A. B., "testified by his being a party to those presents;" the meaning is, that the written consent shall be signed in the presence of a witness.—*Freshfield v. Reed*, 9 M. & W. 404.

PRACTICE.

1. (*Consolidating actions.*) Three actions were brought against three obligors of a joint and several bond, conditioned for the good behaviour of the manager of a joint stock banking company. After the declarations were delivered, the Court, on motion by the defendants, ordered that, the plaintiff proceeding in whichever of the actions he should select, proceedings in the other two should be stayed till the first was tried, defendants undertaking to be bound by the event of the cause first tried, but plaintiff, after such trial, to be at liberty, if disposed, to proceed in the other two.—*Anderson v. Towgood*, 1 Ad. & E. (N. S.) 245.
2. (*Judgment as in case of nonsuit, time for.*) In a town case, where issue is joined in Hilary term, a motion for judgment as in case of a nonsuit, in Trinity term, is not too early. (2 M. & W. 363; 6 D. P. C. 507; 7 D. P. C. 712.)—*Heales v. Kidd*, 1 D. P. C. (N. S.) 663.
3. (*New trial, when to be moved for.*) After a trial had in term, a new trial may be moved for at any time within four days after the return-day of the distringas, and it need not be made within four days of the trial. (1 C. & J. 411.)—*Perkins v. Vaughan*, 1 D. P. C. (N. S.) 700.
4. (*Rescinding judge's order.*) Where a party has obtained a judge's order to set

- aside a judgment on payment of costs, which he has drawn up and served, he cannot afterwards procure the rescission of so much of it as relates to costs.—*Giraud v. Austen*, 1 D. P. C. (N. S.) 703.
5. (*Nul tiel record—Rule for judgment.*) Where, on a motion for judgment on a plea of nul tiel record, upon production of the record, costs are asked for, the Court will not grant a rule absolute in the first instance, although notice of the motion have been given.—*Fraser v. Moses*, 1 D. P. C. (N. S.) 705.
6. (*Time to reply—Holidays.*) On the 24th of March, ten days' time was given to reply, the five following days being holidays; judgment signed for want of a replication, on the 8th of April, was held regular.—*Liffin v. Pitcher*, 1 D. P. C. (N. S.) 767.
7. (*Costs of the day—Judgment as in case of nonsuit.*) Where demurrers to certain of the defendant's pleas are pending, and the plaintiff gives notice of trial of the issues in fact, but does not proceed according to his notice, the defendant is entitled to costs of the day, but not to judgment as in case of a nonsuit.—*Milton v. Griffiths*, 1 D. P. C. (N. S.) 769.
8. (*Judgment as in case of nonsuit.*) In showing cause against a rule for judgment as in case of a nonsuit, it is not sufficient to state the insolvency of the defendant as a matter of information and belief merely.—*Roden v. Stewart*, 1 D. P. C. (N. S.) 771.
9. (*Service of rule.*) Service of a rule nisi to compute, upon the defendant's landlady at his lodgings, she stating that she had given it to the defendant, held sufficient, although he had ceased to reside there, but had not given up the lodgings.—*Clarke v. Roberts*, 1 D. P. C. (N. S.) 778.
10. (*Affidavit of merits.*) Where a defendant makes an affidavit of merits for the purpose of setting aside a regular judgment, the plaintiff cannot make an affidavit in answer.—*Blewitt v. Gordon*, 1 D. P. C. (N. S.) 815.

PRESCRIPTION ACT.

(*Period of prescription, how computed—Intervening life estate—Unity of possession.*)

In trespass, to a plea justifying under a profit à prendre, pleaded under the statute 2 & 3 Will. 4, c. 71, to have been enjoyed thirty years "next before the commencement of the suit," the plaintiff replied that a life estate existed during part, to wit, twenty-seven years of the thirty years in the plea mentioned. Rejoinder, that the life estate did not continue during any part of the said thirty years: Held, under this issue, that though the life estate did in fact exist during part of the thirty years next before the suit, the defendant was entitled under the seventh section to exclude it altogether in the computation, and that he succeeded on the issue by showing an enjoyment of twenty-five years and five years, the former before and the latter after the life estate.

A plea of enjoyment of a profit à prendre for sixty years is defeated by showing an unity of possession during part of the time. That may be shown on a traverse of the plea. Unity of title is a *prima facie* case of unity of possession. (4 M. & W. 496; 2 M. & Rob. 244.)—*Clayton v. Corby*, 2 G. & D. 174.

PRINCIPAL AND AGENT. See MONEY HAD AND RECEIVED, 2.

PRINCIPAL AND SURETY.

(*Surety, where discharged by giving time to principal—Merger in higher security.*)

A., and one B. as his surety, made their promissory note for £50l. payable to the manager of a banking company, as a security for advances made by the

company to A. After the note became due it was (without the consent of the surety) agreed between the company and A. that the latter should execute and deliver to three persons, as trustees of the company, a warrant of attorney to secure the 250*l.* for which the joint note of A. and B. had been given, and a further advance, upon which the trustees were to be at liberty to enter up judgment and issue execution forthwith for the sum due and costs. In an action against the surety upon the note, the jury having negatived a plea that the warrant of attorney was accepted on behalf of the company in full satisfaction and discharge of the principal and interest due upon the note: Held, that the taking the warrant of attorney from the principal debtor without the consent of the surety, did not discharge the latter, there having been no binding contract to give time to the former, though in point of fact the remedy had been delayed. (3 B. & C. 208.) Held also, that the debt due upon the promissory note was not merged in the higher security, the warrant of attorney being between different parties. (3 East, 251.)—*Bell v. Bailey*, 3 Scott, N. R. 497.

2. (*Measure of damages in action by surety against principal—Covenant.*) The plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default: Held, in an action upon this covenant, that the plaintiff was entitled, though he had not paid the note, to recover the full amount of it by way of damages.—*Loosemore v. Rudford*, 9 M. & W. 656.

PROCESS.

1. (*Ca. sa. without testatum clause—Arresting twice.*) In an action, venue Yorkshire, a fi. fa. issued into Yorkshire; the sheriff returned levy of part, and nulla bonâ as to the residue. Afterwards a ca. sa. issued into Middlesex reciting the Yorkshire fi. fa. and return thereto; and after that a ca. sa. into Yorkshire, also reciting the Yorkshire fi. fa. and the return thereto. Defendant was taken on the Yorkshire ca. sa., but discharged on habeas corpus on the ground of supposed privilege at the time of arrest. After the supposed privilege had expired, he was taken in Middlesex on the Middlesex ca. sa. The Court discharged the defendant, and set aside the execution on the Middlesex ca. sa. as irregular, because there should have been a Yorkshire ca. sa. in the first instance, and then a Middlesex testatum ca. sa. reciting such Yorkshire ca. sa.

The Court also refused to allow the Middlesex ca. sa. to be amended on the application of the judgment creditor, first, because the Yorkshire ca. sa. having issued after the Middlesex one, the latter could not be made good by any amendment; secondly, because the rule for amending was obtained after the rule for setting aside the execution, and only two days before showing cause.

Whether after an arrest and discharge therefrom on the ground of privilege, (not being parliamentary, see stat. 2 Jac. 1, c. 13), a party can be again arrested after the privilege has expired, *quære*.—*Towers v. Newton*, 1 Ad. & E. (N. S.) 319.

2. (*Distringas—Search for appearance.*) The time for appearing to a writ of summons expired on the 29th April: on the 30th the plaintiff moved for a distringas, on an affidavit stating a search made on that day, and that no appearance had been entered. The affidavit being defective, it was re-sworn, and the motion renewed, and the rule granted on the 3d May. On an affidavit that an appearance had been entered for the defendant on the 30th April,

the Court set aside the *distringas* and subsequent proceedings.—*M'Claine v. Abrahams*, 3 Scott, N. R. 474.

3. (*Ca. sa. after proceeding by foreign attachment.*) A plaintiff having obtained final judgment, proceeded against the defendant for the same cause of action by attachment in the Lord Mayor's Court. The defendant surrendered in dissolution of the attachment, and while in custody the plaintiff issued a *ca. sa.* and detained him thereon: Held, that the *ca. sa.* was not irregular. (*Barnes*, 208; 5 Taunt. 851, 852.)—*Chamberlayne v. Green*, 1 D. P. C. (N. S.) 649.

4. (*Setting aside capias under 1 & 2 Vict. c. 110, s. 3, practice on—Indorsement on capias.*) Where a defendant seeks to be relieved from the consequences of a judge's order for issuing a *capias* against him under the 1 & 2 Vict. c. 110, s. 3, it is not necessary that he should bring before the Court the affidavits on which the order was obtained, unless when he seeks to show that it was granted on insufficient grounds; in that case he must. The Court, however, though they think sufficient ground has not been laid for setting aside the order, have authority to order the bail-bond to be given up to be cancelled.

An indorsement on a *capias*, "This writ was issued by H. N. of the Fleet Prison, in the parish of, &c.," held sufficient.—*Needham v. Bristol*, 1 D. P. C. (N. S.) 700.

5. (*Distringas.*) The Court will grant a *distringas* on an affidavit stating three calls to have been made at the defendant's house, though two of them were on the same day. (See 9 D. P. C. 725.)—*Mills v. Boulbee*, 1 D. P. C. (N. S.) 707.

6. (*Variance of writ from judgment.*) The mandatory part of a writ of execution must follow the statement of the judgment. Therefore, where the writ directed the sheriff that he "cause to be made as well a certain debt of £69l. parcel of a certain debt of 500l. recovered by J. C. &c. &c. as also 5l. 5s. which in our said Court was awarded, &c. for damages, &c., together with interest, &c.," it was held irregular on the ground of variance. (8 M. & W. 319.)—*Cobbold v. Chilver*, 1 D. P. C. (N. S.) 726.

7. (*Distringas returnable on dies non.*) A *distringas* returnable on a Sunday is a nullity. (4 B. & Ald. 288; 4 D. P. C. 48.)—*Morrison v. Manley*, 1 D. P. C. (N. S.) 773.

8. (*Order under 1 & 2 Vict. c. 110, s. 3, must be made at chambers.*) The Court has no power under the 1 & 2 Vict. c. 110, s. 3, to order the arrest of a defendant; the application must be made to a judge at chambers.—*Barnett v. Craw*, 1 D. P. C. (N. S.) 774.

9. (*Successive writs—Want of original ca. sa. to support testatum, how waived—Ca. sa. within what time executable.*) The want of an original *ca. sa.* to support a *testatum ca. sa.* is an irregularity, which is waived by allowing three terms to elapse after the arrest of the defendant on the *testatum ca. sa.* before he applies to set it aside.

It is no objection to a *testatum ca. sa.* that it is executed more than a year and a day after it was issued, provided it has been issued within a year after the judgment, although there is no continuance of the writ on the roll.—(5 M. & W. 631.)—*Thomas v. Harris*, 1 D. P. C. (N. S.) 793.

QUO WARRANTO.

(*Who may be relator—Time for.*) It is a sufficient compliance by a relator with R. G. M. T. 3 Vict. to state in his affidavit that he has directed the application

for the rule, that the motion will be made at his instance as relator, and that he shall be deemed relator, &c. (11 Ad. & E. 163.) Under special circumstances the Court, in the exercise of its discretion, discharged a rule for an information in the nature of a quo warranto against a burgess, the application being made so late that it would not be disposed of before another revision of the burgess roll would be had.—*Reg. v. Anderson*, 2 G. & D. 113.

RAILWAY ACT.

1. (*Construction of—Evidence of proprietorship—Transfer of shares.—Forfeiture.*)

A railway act, 6 & 7 Will. 4, c. lxxix., enacted, that the persons who had subscribed or should subscribe towards the undertaking, should be the railway company, and should pay calls &c. that the company might raise a capital to be divided into numbered shares, such shares to be vested in the parties taking the same, their executors &c., and assigns, in proportion to the sums they should contribute, and that all persons who had subscribed or should subscribe for shares &c., should be entitled to proportionable parts of the net profits; that the proprietors of shares might sell them, and that the conveyance should be by writing duly stamped, a memorial of which was to be entered into a book by the Company, and till such entry the seller should be liable for calls, and the buyers receive no profits.

It was also enacted, that the Company should enter in a book the names of the persons who should then be or should from time to time become entitled to shares, the number of shares to which the persons respectively should be entitled, and the amount of subscriptions paid thereon, and that in all actions for calls the book should be *prima facie* evidence of the defendant being a proprietor, and for the number and amount of his shares. Also that if any shareholder should neglect or refuse to pay calls, the directors might declare his shares forfeited, but no advantage should be taken of the forfeiture until a certain notice had been given, and the declaration confirmed at a meeting. In an action for calls, it appeared that the original subscriptions were made by executing a contract under seal, conformably to the standing orders of the houses of parliament; the subscriber made a deposit, and having a scrip receipt given to him, defendant bought shares of a subscriber, and took from him scrip receipts, each of which certified that the holder, having signed a parliamentary engagement, and agreed to pay calls, was the proprietor of one share &c. After the act had passed, defendant claimed to be and was registered as the proprietor of the shares, the vendor of the shares not having yet been registered: defendant afterwards attended a meeting and claimed to vote, but was not permitted, because his calls were unpaid. He never signed the parliamentary contract, nor obtained a written conveyance of the shares. On an issue whether or not the defendant was a proprietor when the calls in question were made, which was after his being registered: Held, that defendant was such proprietor.

The register book produced at the trial did not contain the amounts of subscriptions paid on the respective shares: Held, nevertheless, that it was *prima facie* evidence of defendant being proprietor of the shares.

Before the meeting at which the defendant's vote was rejected, the company gave him notice that if he did not pay his calls then due by a day named, also before the meeting, and before the action was brought, his shares would be declared forfeited. Defendant did not pay, nor was the forfeiture confirmed.

Held, that these facts did not enable the defendant to allege that his shares

had been forfeited, or preclude the plaintiffs from treating him as a proprietor. (2 Man. & G. 506; 6 M. & W. 707.)—*Birmingham, Bristol and Thames Junction Railway Company v. Locke*, 1 Ad. & E. (N. S.) 256.

2. (*Construction of—Transfer of shares.—Evidence of proprietorship.*) A railway act, 6 & 7 W. 4, c. civ., enacted, that all persons who had subscribed or should thereafter subscribe towards the undertaking, and their successors &c., and assigns, should be the company for making, &c. the railway, and might raise among themselves 600,000*l.*, to be divided into 50*l.* shares, which were thereby vested in the parties taking the same, and their respective successors &c. and assigns, and that every person &c., and their successors &c., and assigns, who had subscribed or should subscribe for shares, or such sums as should be demanded in lieu thereof, towards the undertaking, should be entitled to profits, &c.

Also that the company should, at a meeting, and from time to time afterwards, enter into a book to be kept by them, the names and additions of the persons who should then be or should thereafter from time to time become entitled to shares, and the number of shares held, and the amount of subscription paid by each. Power was given to the company to make calls, and recover the amount by action, and in actions for calls, the book was to be *prima facie* evidence, that the party registered therein was a proprietor, and of the number and amount of his shares. The act also empowered proprietors to sell their shares, the conveyance to be in a certain written or printed form, and stamped, and a memorial thereof to be entered; and till such entry the seller was to remain liable for calls, and the buyer have no right to profits. Certain compulsory powers were given to the company, but the act, reciting that a part of 600,000*l.* had already been subscribed, forbade the exercise of such powers till the whole amount should have been subscribed for in like manner. Before the passing of the act, A. & B. became respectively possessed of scrip certificates of certain shares which had belonged to subscribers. The certificates stated respectively, that the holders, having signed the parliamentary contract required by the standing orders, and agreed to pay all calls, were the proprietors of shares, &c. A. and B. had not signed the contract, nor executed any formal subscription to the undertaking. After the passing of the act they advertised for holders of scrip to bring it in to be registered. A. and B. brought in their certificates accordingly; and the shares were registered in their respective names. No memorial of a sale to either was ever entered. A. afterwards attended a half-yearly meeting of the company, and B. paid a call on his shares. In actions against A. and B. for calls, held that the absence of proof as to subscription, and the want of a memorial, did not prevent A. or B. from being liable as a proprietor.

Also that the book, containing the requisite particulars as to A. and B., was evidence against them, though it did not contain the names of all the original subscribers. (2 Man. & G. 606.)—*London Grand Junction Railway Company v. Graham*, 1 Ad. & E. (N. S.) 271.

3. (*Action for calls.—Claim to inspect minute-books.—Demand and refusal.*) By an act (6 & 7 Will. 4, c. lxxix.) establishing a railway company, the management of the company was vested in directors; they were empowered to make calls, under certain regulations as to the time &c., and were directed to enter their proceedings in books; and it was declared competent to any general or special general meeting of the company, to call for and inspect all books &c. and docu-

ments, relating to the company, and to require any information from the directors.

It was also provided that, in any action by the company against a shareholder for calls, it should be sufficient to declare that defendant, being proprietor of a share, is indebted to the company and in such sum as the calls amount to, for so many calls upon a share belonging to him, whereby an action hath accrued &c., and that it should be sufficient to prove that defendant, at the time of making the calls, was a shareholder, and that such call was in fact made and notice given as directed by the act, whereupon the plaintiffs should recover, unless it appeared that the call exceeded the proper amount, or was made payable too soon after the last preceding call, or that notice had not been given according to the act. In an action against a shareholder for calls, the declaration being as above: Held, that the defendant could not claim to inspect the minute books of the Company and of the directors' meetings, "particularly with respect to the calls" sued upon, for the purpose of framing his plea; and a rule nisi for such inspection was discharged. The defendant, in the first instance, applied to a judge on summons, which was attended by the plaintiffs, and the judge referred the question to the court.

Semble, that if the inspection had been grantable, the proceedings on summons were equivalent to a demand and refusal.—*Birmingham, Bristol and Thames Junction Railway Company v. White*, 1 Ad. & E. 282.

REPLEVIN.

(*Payment into Court in.*) In replevin, a defendant may pay money into Court as to a part of the distress, and avow as to the residue.—*Lambert v. Hepworth*, 2 G. & D. 112.

And see BANKRUPTCY, 2.

REPLEVIN BOND.

(*Breach of—Pleading.*) To a declaration on a replevin bond, conditioned that the obligor should appear at the next county court, and then and there prosecute his suit with effect against the plaintiff and A. B., assigning for breach, that "the defendant did not appear at the county court so holden next after the making of the bond as aforesaid, and then and there prosecute his suit with effect against the plaintiff and A. B., according to the form and effect of the condition, but wholly omitted and neglected so to do;" the defendant pleaded, that at the county court holden next after the making of the bond, *the plaintiff and A. B.*, according to the practice of the county court, entered their appearance in the said court to the said plaint of the defendant in the declaration mentioned, and that the said suit from thence hitherto had been, and still was depending and undetermined; concluding with a verification: Held, on special demurrer, that the plea was no answer to the action. (5 B. & Adol. 146.)

Semble, that the breach was not well assigned. (8 M. & W. 477.)—*Rider v. Edwards*, 3 Scott, N. R. 456.

REVERSIONER. See ACTION ON THE CASE, 2.

SESSIONS.

(*Jurisdiction of, to hear case sent back to be re-stated—Notice, necessity of.*) Where an order of justices has been quashed on appeal subject to a case, and the Court of Q. B. directs the case to be re-stated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order, without a notice by

one of the parties to the other, of an intention to proceed at such sessions, which notice may in such case be given by the respondents.

Serving a copy of the rule of this Court, directing the case to be re-stated, will not dispense with such service of a notice.—*Reg. v. Barnes*, 2 G. & D. 233.

SETTLEMENT.

(*By hiring tenement—Hiring for a year—Lunar and calendar months.*) A house and land were taken by lease, "for the term of six months from the 1st day of January next, (1830,) "and so on for six months to six months until one of the said parties shall give to the other six calendar months' notice in writing to determine the tenancy, at and under the rent of 13*l.* for every six months, the first payment to be made on the 1st day of July 1830:" Held, that the months here spoken of were shown by the context to be calendar months, and this was a taking for the year at least, by which a settlement might be gained under stat. 6 G. 4, c. 57, s. 2.—*Reg. v. Inhabitants of Chawton*, 1 Ad. & E. (N. S.) 247.

And see LUNATIC.

SHERIFF.

1. (*Extortion by—Costs of taxation of fees.*) Where a sheriff takes a greater amount of fees than he is entitled to receive by the scale made under the 1 Vic. c. 55, and on taxation under a judge's order, by consent, the amount of his claim is reduced, the Court cannot compel him to pay the costs of such taxation, the 4th section of that statute applying only to the cases where the taxation has taken place in consequence of a complaint to the Court under sect. 3.—*Curlewis v. Bird*, 1 D. P. C. (N. S.) 752.

2. (*Amending return.*) A sheriff returned to a writ of *fi. fa.*, that he had seized the goods, and that they were in his hands for want of buyers. An action was brought against him for a false return, and he obtained an order for time to plead on the usual terms, taking short notice of trial. The Court refused, after this, to amend the return by substituting that of *nulla bona*.—*Wylie v. Pearson*, 1 D. P. C. (N. S.) 807.

And see PLEADING, 15.

STAMP.

1. (*Mortgage stamp, when necessary.*) A firm that was negotiating to obtain an advance of money on their bill wrote to the proposed lender, stating that, in consideration of his accepting their draft, they handed him therewith the bill of lading and policy of insurance for wines expected to arrive, which would afford him security beyond the amount of the bill, and engaging to land and warehouse the wines, to be held at his disposal: Held, that this document did not require a mortgage stamp, within the 55 Geo. 3, c. 184, schedule, part 1, title "Mortgage." (2 B. & Ald. 778).—*Harris v. Birch*, 9 M. & W. 591.

2. (*Agreement stamp, when required.*) Pending a negotiation for a tenancy, the terms of which were arranged by parol, the landlord signed and delivered to the tenant the following memorandum: "I shall be happy to allow Mr. B. to leave the apartments without any notice if he finds anything which may at all lead him to suspect that there is any embarrassment in his landlord:" Held, that this was not such an agreement or minute of an agreement as to require a stamp. (1 Man. & G. 359; 2 Ad. & E. 210; 3 B. & Cr. 665, 690).—*Bethell v. Blencowe*, 3 Scott, N. R. 568.

3. (*New stamp, when necessary on alteration of instrument.*) In a joint and several

promissory note made by three persons, after two of the makers had signed it, the third, before signing it, caused the words "on account of club held at Mr. D.'s" to be introduced after the words "value received:" Held, that inasmuch as the note was not complete until signed by all the three, the alteration did not render a fresh stamp necessary. (5 B. & Ald. 674; 10 East, 431.)—*Wright v. Inskaw*, 1 D. P. C. (N. S.) 802.

AND see FRAUDS, STATUTE OF, 2; MONEY HAD AND RECEIVED, 2; WARRANT OF ATTORNEY, 2.

STOCKJOBING ACT.

Indebitatus assumpsit for stock sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. Plea, that the stock alleged to be caused to be transferred was so caused to be transferred by virtue of an agreement with the plaintiff for the transfer of the same, in consideration of 455*l.* 5*s.* to be therefore paid to the plaintiff for the same; and that, at the time of making such agreement, the plaintiff was not actually possessed of, or entitled to, the stock in his own right, &c.; by means whereof the said contract became and was null and void: Held, on error brought from the decision of the Court of Exchequer, that the plea was no answer to the action, and that the contract was not within 7 Geo. 2, c. 8, s. 8: affirming the judgment of the Court below.—*McCallan v. Mortimer*, 9 M. & W. 636.

STOPPAGE IN TRANSITU.

(*Notice of stoppage, to whom to be given—Possession of consignee, when complete—Evidence of authority to stop in transitu.*) A notice of stoppage in transitu, to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody, at such a time, and under such circumstances, as that he may by the exercise of reasonable diligence communicate it to his servant in time to prevent the delivery to the consignee. Therefore, where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the shipowner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor—was held not to be a sufficient notice of stoppage in transitu. (7 Taunt. 169.)

The vessel arrived in port on the 8th of August, on which day, before the captain had received his owner's letter, the agent of the assignees of the vendee (who had become bankrupt) went on board, and told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They then went on shore together. Shortly afterwards the agent of the vendor came on board, and served a notice of stoppage in transitu upon the mate, who had charge of the cargo; and a few days afterwards received possession of the cargo from the captain: Held, that, under these circumstances, there was no actual possession taken of the goods by the assignees; and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them.

Quære, whether the act of marking or taking samples, or the like, without

any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, will amount to a *constructive* possession, unless accompanied by circumstances denoting that the carrier was intended to keep, and assented to keep, possession of the goods as the agent of the vendee.

Before the consignor knew of the bankruptcy of the consignee, he had sent three letters to the manager of a bank in Liverpool, inclosing bills drawn by himself upon certain parties, and he referred therein to the defendants as persons who would settle any irregularity that might occur respecting the acceptances. These letters were communicated to the defendants, and assented to by them. Another letter to the same party inclosed a bill drawn upon the consignee for the price of the timber in question: Held, that the letters were admissible in evidence, and were some evidence to show an authority in the defendants to stop the cargo in transitu.

The consignor, *before* the stoppage in transitu, wrote a letter to the defendants, in which he assumed that they had stopped the cargo, and gave directions as to the sale of it. This letter did not reach the defendants until *after* the stoppage. *Quære*, whether it gave authority to them to stop the cargo at the time of the stoppage, or amounted to a valid ratification of that act.—*Whitehead v. Anderson*, 9 M. & W. 518.

TENDER. See MONEY HAD AND RECEIVED, 1.

TIPPLING ACT.

The stat 24 Geo. 2, c. 40, s. 12, which enacts that no action shall be maintained for any debt on account of spirituous liquors, unless the debt be *bonâ fide* contracted at one time to the amount of 20s., applies to cases where the liquor is sold not to be consumed by the purchaser, but to be sold again by such purchaser (being a publican) to his customers. (Overruling *Johnson v. Attrill*, 1 Peake's N. P. C. 180.)

To a declaration in debt for goods sold and delivered, defendant pleaded that the sum was claimed in respect of spirituous liquors supplied by plaintiff to defendant, and not in respect of any other matter; and that no part of the sum or demand was *bonâ fide* contracted by defendant at any one time to the amount of 20s. or upwards: Held, that this plea showed a defence under the statute, though it did not expressly negative the supposition that the sum might be made up of claims upon sales originally exceeding 20s. each, but reduced below that amount by part payment.—*Hughes v. Done*, 1 Ad. & E. (N. S.) 296.

TITHE COMMUTATION ACT.

Where, during the pendency of a suit for the recovery of tithes, a tithe commissioner proceeded to inquire into the validity of a modus within the parish, under the 6 & 7 Will. 4, c. 71, s. 45, but declined to make an award until the suit was determined, the Court refused to compel him by mandamus to do so.—*In re Tithe Commissioners*, 1 D. P. C. (N. S.) 810.

TRESPASS.

1. (*De bonis asportatis—Damages.*) Trespass for breaking and entering the dwelling-house of the plaintiff, and taking away certain goods therein, *not* alleging them to be plaintiff's goods. Plea, not guilty by statute. The learned judge at the trial having directed the jury to find a verdict for the plaintiff, with nominal damages for the trespass to the house: Held, that the plaintiff was not en-

titled to damages for the value of the goods, as they were not alleged to be the property of the plaintiff.—*Pritchard v. Long*, 9 M. & W. 665.

2. (*For taking coals from mine—Evidence of possession—Measure of damages.*) In trespass for breaking and entering the plaintiff's mine and taking coal, evidence of working by the plaintiffs in another part of the same mine, within eighty yards of the place of the alleged trespass, coupled with a statement by the defendant, that he had got the coal, and was willing to pay such amount as should be settled by arbitration, was held to be evidence of the plaintiff's being in possession of the place where the trespass was committed. (1 Man. & Gr. 605.)

In trespass for taking coals from the plaintiff's mine, where the defendant is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals got from the mine. (5 M. & W. 351.)—*Wild v. Holt*, 9 M. & W. 671.

TROVER.

- (*For expired lease.*) Trover lies not at the suit of the lessor against the lessee to obtain possession of the indenture of lease, upon the expiration of the term by forfeiture or otherwise.—*Hall v. Ball*, 3 Scott, N. R. 577.

USE AND OCCUPATION.

- (*Liability for, by holding over of co-tenant—Evidence—Judgment in former action.*)

Where premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use and occupation, for so long as A. continues actually to occupy, but no longer.

Quære, whether both are so liable where A. holds over without B.'s consent. (6 M. & W. 393; 7 M. & W. 127.)

A judgment obtained by A. in an action of use and occupation, against B. and C., is no evidence to charge B. in a subsequent action brought by A. against him alone, for the use and occupation of the same premises for a subsequent period.—*Christy v. Tancred*, 9 M. & W. 438.

VENUE.

- (*Undertaking to give material evidence—Of what the Court takes judicial notice.*)

The plaintiff having brought back the venue to London, on an undertaking to give material evidence therein, gave in evidence certain charters from the Tower of London, but gave no evidence whatever that the Tower, or that part of it from which the charters were produced, was within the city. The plaintiff was nonsuited: Held, that the judge was not bound to take judicial notice of the boundaries of the city of London, and that affidavits were inadmissible, on a motion for a new trial, for the purpose of showing that the Tower was, in point of fact, within the city.—*Brune v. Thompson*, 2 G. & D. 110.

WARRANT OF ATTORNEY.

1. (*Attestation of—Attorney, when liable as for negligence.*) A warrant of attorney was attested in the form following: "Signed, sealed, and delivered by J. A., in my presence, and I subscribe myself as attorney for the said J. A., expressly named by him to attest his execution of these presents: Held, by Alderson, B., to be insufficient; Parke, B., dubitante. (8 M. & W. 294.)

But assuming such attestation to be bad, that it was not such gross negli-

gence as to preclude the attorney of the creditor from recovering his charges in respect of the warrant of attorney, it having been set aside as defective.—*Elkington v. Holland*, 9 M. & W. 658; 1 D. P. C. (N. S.) 643.

2. (*Given by prisoner—Stamp.*) A warrant of attorney, on a 1l. stamp, given by a prisoner, need not state the fact that he is in custody, although a higher stamp would be necessary in case he were not in custody.

A defendant in custody executed a warrant of attorney, not stating on the face of it that he was a prisoner. On the following day it was altered, with the consent of all parties, by the insertion of such statement: Held, that a new stamp was not thereby rendered necessary, the statement being immaterial,

The Court will not entertain an application to set aside a warrant of attorney for the insufficiency of the stamp, because the plaintiff may, even after the rule is granted, have the stamp amended on payment of the penalty.—*Hartley v. Manson*, 1 D. P. C. (N. S.) 711,

3. A warrant of attorney authorized the plaintiff to sign judgment “as of last H. T., next E. T., or any subsequent term:” Held, that a judgment signed under such an authority, in vacation, was irregular.—*Cobbold v. Chilver*, 1 D. P. C. (N. S.) 726. See also *Bremridge v. Wildman*, Id. 774.
4. (*Judgment on old warrant of attorney—Proof of subsistence of debt.*) On an application to sign judgment on an old warrant of attorney, on affidavit by the clerk of the plaintiff’s attorney that the debt was still due, he having received payments on account of the warrant of attorney, and having lately seen the defendant, when he promised to pay a further instalment upon it, was held sufficient proof of the debt being still due.—*Middleton v. Stockdale*, 1 D. P. C. (N. S.) 776.
5. (*In ejectment—Judgment, how to be entered up.*) Where a warrant of attorney authorizes the lessor of the plaintiff to enter up judgment in an action of ejectment, it must be entered up in the name of the nominal plaintiff.—*Doe d. Routledge v. Stewart*, 1 D. P. C. (N. S.) 813.

WARRANTY.

- (*Of soundness—What amounts to unsoundness.*) The term “sound,” in a warranty of a horse or other animal, implies the absence of any disease or seeds of disease in the animal at the time, which actually diminishes or in its progress will diminish his natural usefulness in the work to which he would properly and ordinarily be applied. (2 M. & Rob. 137.)—*Kiddell v. Burnard*, 9 M. & W. 667.

WITNESS.

1. (*Competency of copyholder, to prove custom of manor in favour of his co-copyholder.*) In an action by the lord of a manor against a copyholder, for taking stones, where the defendant justifies under an alleged custom of the manor, entitling the copyholders to take the stones to be used on premises within the manor, any other copyholder is a competent witness for the defendant since the stat. 3 & 4 Will. 4, c. 42, ss. 26, 27.—*Hoyle v. Coupe*, 9 M. & W. 450.
2. (*Competency of parishioner on indictment for non-repair of highway.*) Under the stat. 3 & 4 Vict. c. 26, s. 1, an owner of lands within a parish is competent to give evidence on a prosecution against the parish for non-repair of highway, though he be not a rated inhabitant, the lands being occupied by tenants who are rated for them.—*Reg. v. Doddington*, 1 Ad. & E. (N. S.) 411.

3. (*Objection to competency, when to be taken.*) An objection to the competency of a witness, on the ground of interest, must be taken in the first instance, on the voir dire, or it is too late. (5 Bing. N. C. 477.)—*Wollaston v. Hakewill*, 3 Scott, N. R. 593.
4. (*Examination of, abroad.*) In order to obtain a mandamus to examine witnesses *vivâ voce*, before a colonial Court, at the defendant's instance, he need not depose to his belief that the plea which they are to prove is true, or that he has a good defence on the merits. (1 M. & W. 55.)—*Westmoreland v. Huggins*, 1 D. P. C. (N. S.) 800.

WRIT OF TRIAL.

(*For what irregularity set aside—Notice of trial.*) Where the plaintiff delivered the issue, omitting therein the dates of the teste and return day of the writ of trial, and the cause was tried before the sheriff, and the plaintiff, in the absence of the defendant, obtained a verdict, the Court held, on application to set aside the issue and all subsequent proceedings, that the defendant had waived his objection to the informality of the issue by neglecting to return it, and suffering the cause to proceed.

A notice of trial by continuance before the under-sheriff is a good notice. (1 Bos. & P. 363.)—*Wilson v. Newbitt*, 1 D. P. C. (N. S.) 675.

EQUITY.

[Containing Cases in 1 Young and Collyer, Part 2.]

ADMINISTRATION OF ASSETS.

1. (*Admission—Residue—Statutes of Limitation.*) A memorandum by the executor, stating the amount of a certain proportion of the residue, which was divisible among the plaintiffs, who were infants at the date of the memorandum: Held to be an admission of assets, entitling the plaintiffs to interest on their shares, the claim to such interest not being barrable by the sect. 40 of 3 & 4 Will. 4, c. 27. (See *Philipps v. Mannings*, 2 Myl. & Cr. 309.)—*Dinsdale v. Dudding*, 265.

2. (*Plaintiff's debt.*) It was held no sufficient evidence of the plaintiff's debt to prove as an exhibit an acceptance of the testator.—*Keaton v. Lynch*, 437.

And see EXECUTOR; LEGACY; PLEADING, 2.

AGREEMENT.

(*Reciprocity.*) Where the agreement was to grant a lease without binding the other party to accept it, yet where he had been in possession under the agreement, so as to bind himself by part performance, the agreement was held valid.—*Dowell v. Dew*, 345.

And see FEME COVERT; LEASE, 1, 2.

CHARGE.

(*Letter of attorney.*) Where one, who had joined in a bond as surety for another, afterwards gave a letter of attorney to the creditor, authorizing him to take and keep possession of a rectory and glebe lands, and also of freehold lands, of which he was seised in fee until the payment of the debt secured by the bond: Held, that the letter of attorney operated as a charge, which did not determine, as to the freehold lands, by the death of the party giving it.—*Spooner v. Sandilands*, 390.

CHARITY.

(*Education—Religion.*) Where a charity having been given for the general benefit of a parish, it had been agreed by the parishioners, with the sanction of the Court, that part of the income should be applied for the purpose of education, the Court refused to sanction a scheme by which it had been proposed, with the view of suiting the different sects prevailing in the parish, that selections only from the Scriptures should be read, and the school be closed on a Sunday, the Court saying that it could provide for no other religious education than that which was according to the Church of England, but it allowed a provision for excusing from attendance at church the children of dissenters. It was assumed on all hands, that religious instruction must necessarily form part of the scheme of education.—*Attorney General v. Cullum*, 411.

CHURCH OF ENGLAND. See CHARITY.

CONSIDERATION. See CONTRACT.

CONTRACT.

(*Mistake—Heir apparent.*) Where a person assuming, by mistake, to be entitled in remainder in fee simple to an estate of which the whole fee was vested in his mother, attempted to convey such estate for the benefit of creditors who were parties to the deed, and the estate afterwards descended to him: the conveyance was established against him as a contract.—*Smith v. Baker*, 223.

COSTS. See MORTGAGE, 1; TRUSTEE.

EVIDENCE.

(*Tithe suit—Landowner.*) The evidence of a landowner in the parish, who had been defendant in another similar suit, not admitted in support of a modus.—*Oliver v. Latham*, 243.

And see TRUST.

EDUCATION. See CHARITY.

EXECUTOR.

(*Devastavit—Liability of co-executor.*) Where a surviving executor denied by his answer that he had ever acted during the lifetime of the co-executor, and it was clear that he had not proved till after his death, yet there being some slight evidence of his acceptance of the office during the life of his co-executor, and he having been a party to a composition deed, entered into by the executors of such co-executor, the Court held there was ground for an inquiry, with a view to charge him for devastavits committed during the life of the other.—*James v. Freasen*, 370.

FEME COVERT.

(*Power to lease—Agreement.*) An agreement by feme covert to execute a power of leasing, over lands settled to her separate use, held to be a valid execution of the power, without deciding whether the married woman was personally bound by the agreement.—*Dowell v. Dew*, 345.

HEIR. See CONTRACT.

HUSBAND AND WIFE.

(*Suit against wife.*) A husband held to have been properly made a *defendant* to a suit by his wife, to obtain possession of a fund settled to her separate use.—*Thorby v. Yeats*, 438.

INJUNCTION.

1. (*Breach.*) Where the plaintiff had obtained the common injunction upon payment of the money into the court of law, and the defendant after judgment obtained a rule *nisi* to show cause why the money should not be paid out to him: Held, that this was a breach of the injunction.—*Brooks v. Surton*, 271—274.
2. (*Estoppel—Account.*) The plaintiff in a suit for an account obtained, after answer, an injunction to restrain the defendant from suing him for a sum of 3000*l.*, which formed an item in such account, but such injunction was not granted till the day of trial, and the defendant obtained a verdict for the 3000*l.* The Court, advertent to that circumstance, and also to others which came out in the evidence of the cause, allowed the 3000*l.* to stand as an item in the account. *Abbey v. Petch*, 258.

INSOLVENT.

(*Insolvent co-plaintiff.*) Where an insolvent cestui que trust was joined as a co-plaintiff with the other cestui que trusts, in a suit to establish the trust deeds, and the insolvent assignee was made a defendant: Held, that this was not such a misjoinder as defeated the bill.—*Eades v. Harris*, 230.

And see PRACTICE, 2.

JOINT STOCK COMPANY.

1. (*Employment of directors—Liability of co-directors.*) Where one of six directors of a company had, with the assent of the other directors, but without the sanction of the company, undertaken to act as servant of the company, in an office of trust and liability, viz. that of ship's husband, the Court ordered him to refund the sums which he had received as the usual allowances payable to persons acting in that character, and *Semble*, that the other directors were liable in case of his inability.—*Benson v. Heathorn*, 326.
2. (*Parties.*) A bill sustained, which was brought by the present directors of a company, on behalf of themselves and the other members, against the former directors of the company, to be relieved against a fraud to which all these latter were alleged to have been parties.—*S. C.*
3. (*Registration of ships.*) *Semble*, that the 3 & 4 Will. 4, c. 55, s. 33, which authorizes a particular mode of registering vessels belonging to joint stock companies, does not apply to a company in which there are foreign shareholders. *Quere*, how should the vessels of such a company be registered.—*S. C.*

JURISDICTION. See POOR RATE, 1.

LEASE.

1. (*Agreement—Assignee.*) The assignee of an agreement to grant a lease is entitled to specific performance against the lessor, but only upon the terms of giving him the benefit of the personal liability of the party to the agreement.—*Dowell v. Dew*, 345.
2. (*Power—Reversionary lease.*) Although the power was to lease in possession only, yet where an agreement to grant a new lease was entered into a year and a half before the expiration of the old one, the lessor under the powers having survived the term of such lease, the agreement was held valid, subject to an inquiry by action as to whether the terms of the proposed lease were proper, according to the settlement.—*S. C.*

LEGACY.

(*Imperfect appropriation.*) Where a testator bequeathed to A. and B., two of his three executors, a sum of money to be invested in trust for C. for life, and then to sink into the residue, and A. and B. accordingly invested the money; but after A.'s death, B. sold out the stock and applied the proceeds to his own use: Held, that a legacy given to him by the will, which he had not yet received, but which he had assigned for valuable consideration, was applicable to make good the breach of trust, the appropriation having been defeated by the act of B.—*Morris v. Livie*, 380.

LETTER OF ATTORNEY. See CHARGE.

MISTAKE. See CONTRACT.

MORTGAGE.

1. (*Costs—Sale under a decree.*) A sale under a decree, unless made upon parti-

cular terms, does not vary the right as to costs, which each mortgagee would have had if the proceeding had been by foreclosure, accordingly successive mortgagees were allowed their costs out of the funds produced by the sale, according to the priority of their several securities.—*Barnes v. Racster*, 401.

2. (*Marshalling securities*.) A. having two estates, mortgages one to B. then the other to C., then both to B., then both to D., the subsequent security being taken in each case with notice of the preceding ones, the estates being insufficient for the payment of all: Held, that C. had no equity against D. to throw B.'s debt on the estate on which he C. had not a charge, but that as between C. and D. both estates were liable to B.'s debt, in proportion to their value.—*S. C.*

NEW ORDERS. See PRACTICE, 4.

PARTIES.

1. (*Interest—Assignment by plaintiff pendente lite*.) An assignment *pendente lite* of an equitable interest by one of several co-plaintiffs, held not to make the suit imperfect.—*Eades v. Harris*, 230.
2. (*Next of kin*.) Upon a bill filed to appoint new trustees under a will giving property to A. for life, with remainder to the next of kin of testator living at A.'s death, the next of kin living at the time of the bill filed must be made parties.—*Wardell v. Claxton*, 265.
3. (*Specific Performance*.) To a suit by purchasers for specific performance as to lot A., as described in particulars of sale, the defence made by vendors was, that by an arrangement, to which plaintiff was a party, part of lot A. was added to lot B.: Held, that the purchaser of lot B. was a necessary party.—*Mason v. Franklin*, 239.
4. (*Trust deed*.) Held, that one trustee might file a bill against his co-trustee for recovery of the trust fund without making the cestui que trusts parties; the trust being under a devise with power of sale, and the Court adverting to the effect of the 30th of Lord Cottenham's orders. The objection, too, was not taken till the hearing.—*May v. Selby*, 235.

And see HUSBAND AND WIFE; INSOLVENT; JOINT STOCK COMPANY, 2.

PARTNERSHIP.

1. (*Breach—Acquiescence*.) Where two of three partners entered into engagements in breach of the articles, which the other partner disapproved of, and prohibited for the future, without expressly repudiating what *had been* done, or objecting to the entries connected with it: Held, that the partnership assets were liable in respect of what had been done.—*Cragg v. Ford*, 285.
2. (*Dissolution—Sale of effects*.) Where upon a dissolution of partnership one partner, who was the defendant, undertook for a salary the winding up of the affairs: Held, that he was not solely chargeable for loss arising from delaying the sale of the effects, the other partner not having exercised the right, which the Court held he still had, of compelling a sale at the proper time.—*S. C.*

PLEADING.

1. (*Evidence*.) Plaintiff by his bill prayed for an account of particular tithes. Defendants alleged by their answer that *all* the tithes belonged to another party: Held, that the plaintiff might prove the perception by himself and

predecessors of particular tithes not prayed for by the bill.—*Oliver v. Latham*, 243.

2. (*General relief*.) Where a testator, supposing himself to be entitled to an estate in fee, which he had only in tail with ultimate remainder in fee, devised that estate among others for payment of debts, and afterwards by recovery obtained the fee, but did not republish his will; and afterwards a bill was filed by simple contract creditors against the legatees and heir-at-law for administration of the personal estate, and that if necessary the will might be established and the debts paid out of the realty, and the defendants did not by their answer deny that the particular estate passed by the will; and a receiver was appointed of the estate generally, and the suit then abated and was not revived till eighteen years afterwards, and the objection was then taken that the estate did not pass, and that the plaintiff was not entitled to marshal, the original bill not being expressly or apparently framed for that purpose: Held, nevertheless, that the plaintiffs were entitled to have the benefit of the estate in question by marshalling.—*Vickers v. Oliver*, 211.
3. (*Uncertainty*.) To a bill for tithes the defence was, that the tithes in whatever shape perceptible belonged to the lay impropiator, and a modus was also pleaded to the effect that the profits of a certain field had from time immemorial been enjoyed in lieu of tithes by the "lay impropiator or other owner of the tithes:" Held, that the modus was sufficiently pleaded.—*Oliver v. Latham*, 243.

POOR RATE.

1. (*Jurisdiction*.) Where a portion of the money raised by poor rate had been misapplied, the Court held that it had jurisdiction, and entertained an information, without bill, against those guardians who, being the majority, had directed the misapplication, and the party to whom the money had been paid with notice of the trust, to compel them to replace it.—*Attorney-General v. Compton*, 417.
2. (*Misapplication*.) It was held to be a misapplication of a poor-rate, cognizable by a Court of Equity, to have paid out of it the costs of an action of slander brought vexatiously against one of the officers of the guardians in respect of his official acts. The Court offered a case, but it was refused.—*S. C.*

PRACTICE.

1. (*Costs—Exceptions*.) Although it is not according to strict practice to make an order on exceptions for the costs to be costs in the cause, yet the Court did so, no objection being made.—*Wilkins v. Stevens*, 431.
2. (*Dismissal—Insolvent*.) Where the sole plaintiff became insolvent and the sole defendant was made assignee, the bill was dismissed with costs, not to be recovered personally.—*Daniel v. Harding*, 436.
3. (*Injunction—Amendment*.) Plaintiff, after three amendments, obtained the common injunction, and then obtained a fresh order to amend, which he allowed to expire without acting on it. He then obtained, under the second order of the 9th May, 1839, another order to amend without prejudice to the injunction, which order was discharged for irregularity. He then moved, on notice, for leave to amend "without prejudice," but the Court gave only leave to amend within certain limits, and without adding to the order the words "with-

out prejudice," but the amendment when made was held not to affect the injunction.—*Brooks v. Burton*, 271, 274.

4. (*New orders—Appearance.*) To obtain an order for entering an appearance under the eighth order of August, 1841, the affidavit of service must state where the defendant was served.—*Davis v. Hole*, 440.
5. (*Plea—Taken off the file.*) Defendant having obtained from the master an order for time to "answer, plead, or demur, not demurring alone," and the words in italics having been struck out, on special application, by the Court, a plea by defendant was taken off the file.—*Brooks v. Purton*, 271, 278.

And see MORTGAGE, 1.

RELIGION. See CHARITY.

SHIP. See JOINT STOCK COMPANY, 3.

SPECIFIC PERFORMANCE. See LEASE, 1.

STATUTE OF LIMITATIONS.

1. (*Bill of exchange.*) The right of action of the drawer of the bill commences for the purposes of the statute, not from the time of his paying the bill, but from the time of the bill arriving at maturity. So held in a case where the bill had been paid before its time.—*Coppin v. Gray*, 205.
2. (*Commencement of suit.*) The commencement of a suit is reckoned, for the purposes of the statute, from the filing of the bill and not from the service of the subpoena; and it was so held in a case where the subpoena had not been served till two years after the filing of the bill.—*S. C.*

And see ADMINISTRATION OF ASSETS, 1.

TITHES. See PLEADING, 1.

TITLE OF PLAINTIFF.

(*Tithe suit—Enjoyment of tithes.*) In a suit for tithes by perpetual curate, although there was some evidence to show that previous to the year 1715, the curate had received tithes by permission only of the lay impropriator, some perception of tithes by the curate since that time being proved, and no perception by the impropriator: Held, that the title of the plaintiff was sufficiently established.—*Oliver v. Latham*, 243.

TRUST.

(*Purchase with trust money.*) As to the evidence required in order to follow trust money, alleged to have been laid out by a trustee in the purchase of an estate for himself, see *Wilkins v. Stevens*, 431.

TRUSTEES.

(*Costs—Married woman.*) Trustees to the separate use of a married woman ordered to pay the costs of a suit for transfer of the fund to her, the ground of their previous refusal being an alleged verbal promise, to the testator who gave the fund, that they would not part with it to her.—*Thorby v. Yeats*, 438.

And see PARTIES, 4.

WILL.

1. (*Construction—Charge of debts.*) Testator after "directing all his debts to be paid," added "I then give" certain legacies, which he made payable out of a

particular fund: Held, that this fund was not made primarily liable to the payment of debts.—*Parker v. Marchant*, 290.

2. (*Construction—Description of legatees.*) Under a bequest of “500*l.* each to the other servants,” a servant who quitted the service after the date of the will was held entitled.—*S. C.*
3. (*Construction—Ready money.*) Money in the hands of the testator’s banker, held to pass by the description of “ready money;” but see *Carr v. Carr*, 1 Mer. 541.—*S. C.*
4. (*Construction—Residue.*) Testator after giving various legacies and “all the rest and residue of his ready money, securities for money, and money in the funds” to other parties, concluded as follows: “And I do further give and bequeath to my said wife all my jewels, plate, linen, china, carriages, wines, and other goods and chattels whatsoever:” Held, that the latter words carried the general residue.
Observations as to construction generally of “goods, chattels, and effects.”—*S. C.*

5. (*Construction—Tenant for life—Conversion—Interest.*) Testator gave the residue of his personalty in trust to be converted by his executors from time to time, as they should think best, for payment of his debts and legacies, and subject thereto he directed them from time to time to invest the same, with the accumulated produce, in the purchase of lands, to be conveyed to the same uses as other lands devised by the will, and he directed that the interest and produce of his said personal estate should be paid to the person who would under the will be entitled to the rents of the real estate: Held, that the tenant for life was entitled to the income, from the testator’s death, of such parts of the personal estate as were in a proper state of investment, and to the income of such parts only. (See *Taylor v. Clarke*, 1 Hare, 161.)—*Caldecott v. Caldecott*, 312.

BANKRUPTCY.

[Containing Cases in 2 Montagu, Deacon and De Gez, Part 2.]

ACT OF BANKRUPTCY.

(1 & 2 Vict. c. 110, s. 8.) Where a mortgagee a week after making demand of payment under this act, in order, as it appeared, to avoid personal tender, absented himself from his house during the whole of the twenty-one days allowed by the act, and the day after the expiration of that term, but before the return of the mortgagee, the mortgagor tendered the proper sum at the office of the mortgagee, where the tender was refused: Held, that there was no act of bankruptcy.

Another objection was, that the act of bankruptcy had been got up to meet the views of another creditor, for whom the petitioning creditor was solicitor.—*Exp. and re Gratton*, 401.

AFFIDAVIT. See PRACTICE, 1.

ANNULLING.

(*Want of prosecution—Collusion.*) In the proceedings under a London fiat, the bankruptcy is found on the fourteenth day and advertised on the fifteenth, without any intermediate notice of the adjudication being given at the office. On the fifteenth day an application is made by another party for a new fiat, and to annul the former, for want of prosecution; and on the sixteenth day an order to that effect is made.

A petition to rescind this order dismissed, there being no statement in the petition or in the affidavits of either side, as to the solicitor who obtained the order having notice of the adjudication, but there being grounds for suspecting collusion between the bankrupt and the party suing out the annulled fiat.—*Exp. Getting, re Burnie*, 498.

And see DIRECTION OF FIAT.

APPEAL. See SUPPRESSION.

ASSIGNEES.

(*Choice of—Interested creditor.*) Where the commissioners at the election of assignees rejected votes which would have turned the choice, on the ground that the creditors tendering them had an adverse interest to the general body of creditors, the Court set aside the choice which had been ratified by the commissioners, and, without directing a new one, declared the assignees elected by the majority duly chosen.—*Exp. Stallard, re Freeland*, 469.

ASSIGNMENT. See GOODWILL.

BANKRUPT.

(*Trading by uncertificated bankrupt.*) A bankrupt having obtained his certificate under a second bankruptcy, but not having paid 15s. in the pound, sets up in trade as a tailor and draper and sends circulars soliciting custom to several of

the creditors who have proved under the second bankruptcy, and among others to one of the creditors' assignees. He continues to trade for five years, without molestation on the part of the creditors, having his name conspicuously written on the trade premises, and having exposed to view there stock in trade of considerable value, and then becomes bankrupt a third time: Held, that the assignee under the last bankruptcy could not be called upon to deliver up the assets collected by him to the assignees under the second fiat.—*Exp. Jungmichel, re Carter*, 471.

And see CERTIFICATE; EXECUTOR; REPUTED OWNERSHIP, 1.

BILL OF EXCHANGE.

(*Unauthorized acceptance—Recognition.*) Where one accepted bills in the name of his brother, for which, after they were dishonoured, the brother acknowledged himself in writing "to be responsible," and verbally admitted himself to have authorized the acceptance, such acknowledgment and admission appearing to be for the purpose of screening his brother from a prosecution for forgery, there was held to be no proveable debt.—*Exp. Edwards, re Latham*, 241.

And see DEBT, 1; ELECTION.

CERTIFICATE.

(*Lunatic bankrupt.*) Where it was shown by affidavit, there having been no commission, that the bankrupt was a lunatic, his affidavit of conformity was dispensed with.—*Exp. and re May*, 381.

CONCERT:

1. (*Principle as to concert.*) Concert of itself does not defeat the fiat, unless used for the purposes of the bankrupt or the petitioning creditor.—*Exp. Spicer, re Kipping*, 389.
2. (*Costs of annulling—Solicitor.*) Where the act of bankruptcy was concerted between the solicitor, the petitioning creditor and the bankrupt, for the sole purpose of defeating an execution creditor, and the solicitor was the prime mover of the plot, the fiat was annulled, with costs, as against the solicitor, the bankrupt, and the petitioning creditor.—*Exp. Barnett, re Hardy*, 325.
3. (*Solicitor—Costs.*) A solicitor who had been a party to a concerted fiat, by means of a sham act of bankruptcy, was refused his costs.—*Exp. Woodward, re Hardy*, 249.

COSTS.

(*Before choice of assignees.*) Neither the petitioning creditor, nor the solicitor, can petition for the payment of the costs up to the choice of assignees, without alleging and proving that the commissioners made an order for the payment of them.

Semble, that the solicitor cannot petition for the payment of these costs, without the privity of the petitioning creditor.—*Exp. Cooper, re Jones*, 420.

And see CONCERT, 2, 3; LEASE, 2; SOLICITOR, 1; SUPPRESSION.

DEBT.

1. (*Bill of exchange.*) Where the drawer of a bill accepted by the bankrupt, had at his request drawn a second bill upon him, which the drawer was to get discounted, in order that the proceeds might be applied in payment of the first bill, but the drawer of the bill having got it discounted, kept the proceeds for himself, the holder of the second bill was admitted to prove upon his affi-

davit that he was ignorant of the fraud practised on bankrupt.—*Ex parte Samuel, re Philpot*, 384.

2. (*Bill of Exchange—Concert.*) Where the drawer of a bill of exchange, after action brought upon it in the name of a party who in reality held it for him, took it up, and then with the view of making the acceptor a bankrupt, the day before the fiat indorsed it to another, in order to qualify him as petitioning creditor: Held, that the debt was not sufficient.—*Exp. Hawkins, re Worsfold*, 320.
3. (*Decree for account.*) Where the creditor had obtained a decree in equity, for payment of what the master should find due to him upon taking an account, and the master did not make his report until after the fiat: Held, that there was no proveable debt.—*Exp. Crosse, re Bedingfield*, 308.

And see ELECTION; SECURITY.

DIRECTION OF FIAT.

- (*Annulling for wrong direction.*) Where an order for a London fiat had been obtained at the instance of the petitioning creditor, instead of one directed to the place where the bankrupt had carried on his business, and where the greater number of his creditors resided: and it afterwards appeared to the Court, that there was reason to suspect that the venue had been changed to serve some secret purpose of the bankrupt, and that the petitioning creditor was colluding with the bankrupt to accomplish his object; the London fiat was annulled, and a country fiat directed to issue.—*Exp. Millar, re Irving*, 237.

DIVIDEND.

- (*Suspending.*) The Court will not suspend the payment of a dividend, on the ground of a pending action against the creditor, in which it was sought to charge him as a partner with the bankrupt, after the very same question had been litigated by the petitioner, and decided upon by this Court.—*Exp. Turquand, re Vanderplank*, 345.

ELECTION.

- (*Severance of debt.*) Where the bankrupt and the creditor had various bill transactions together, which were entered in a current account and the creditors after proving upon four of such bills took up four other bills and brought an action upon them: Held, that he might do so, the debts being distinct.—*Exp. and re Newton*, 422.

And see JOINT AND SEPARATE CREDITORS, 1.

EQUITABLE MORTGAGE.

1. (*Change of firm.*) Where deeds are deposited with a banking firm, to secure the balance due from time to time, the lien subsists without any fresh stipulation, notwithstanding any subsequent change in the constitution of that firm.—*Exp. Smith, re Gye*, 314.
2. (*Contract to purchase.*) Where the bankrupt having contracted to purchase shares of the United States Bank, left the certificates with the vendor as a security for the greater part of the purchase money: Held, that this constituted an equitable mortgage.—*Exp. Shepherd, re Barlow*, 431.

ESTOPPEL.

- (*Previous affidavit.*) Where the bankrupt applied to annul the fiat on the ground of infancy, and it appeared that on the occasion of his marriage a year before

the fiat was issued, he had made an affidavit that he was then of age, his petition was dismissed with costs.—*Exp. and re Bates*, 337.

EVIDENCE. See PRACTICE, 3.

EXECUTOR.

(*Bankrupt executor.*) Part of the effects which came into the hands of an executor's assignees on his bankruptcy consisted of specific assets of the testator. A suit in chancery being instituted for the administration of the testator's estate, the proceeds of these assets were ordered by the Court of Review to be retained and invested, although no accounts had been taken, the suit in chancery not having proceeded to a decree.—*Exp. Wright, re Biddulph*, 491.

And see REPUTED OWNERSHIP, 1.

EXECUTOR OF BANKRUPT. See JOINT AND SEPARATE CREDITORS, 2.

GOODWILL.

(*What passes to assignees.*) As to how far and under what circumstances goodwill passes to assignees, see *Exp. Thomas, re Thomas*, 294.

HABEAS CORPUS. See JURISDICTION.

INDEMNITY. See SOLICITOR, 2.

INSPECTOR.

1. (*Costs of appointment.*) Where an inspector is appointed to protect the interests of the separate creditors, the costs of and incidental to the application are directed to be paid out of the separate estate.—*Exp. Holford, re Hurst*, 485.
2. (*Powers of.*) The Court gave the inspector appointed to protect the separate estate under a joint fiat power to collect the separate debts, and to sue in the name of the assignees.—*Exp. Wright, re Daintry*, 434.
3. (*Time of appointment.*) The Court will not order the appointment of an inspector of the separate estate of one of the bankrupts before the choice of assignees.—*Re Daintry*, 257.

JOINT AND SEPARATE CREDITORS.

1. (*Election.*) A joint and separate creditor, who has proved against the joint estate, will not be permitted, except on special grounds, to retire from his proof, and prove against the separate estate.—*Exp. Dixon, re Robinson*, 312.
2. (*Surplus of separate estate.*) Joint creditors who have proved under a separate fiat are entitled to receive a dividend out of the surplus of such estate before the separate creditors receive interest, such claim being opposed not only by the separate creditors, but by the personal representatives of the bankrupt, who were held by appearing to have waived their right of questioning the jurisdiction of the Court.—*Exp. Wood, re Webster*, 283.

JOINT AND SEPARATE ESTATE.

(*Transfer from one to the other.*) Where A. and B. two partners having one interest in the return proceeds of a foreign consignment, dissolve partnership, and agree that their interest shall be vested in B., and afterwards separate fiats being issued against each, the assignee of A. assigned all his interest in the said proceeds to B. though no notice of the transfer had been given to the foreign consignees: Held, that the proceeds belonged to the separate estate of B.—*Exp. Birley, re Krauss*, 354. (See S. C., vol. 1, p. 387, ante, L. M. No. 53.)

And see SPECIAL CASES, I,

JOINT STOCK COMPANY. See **REPUTED OWNERSHIP**, 4; **SPECIAL CASES**, 2.

JURISDICTION.

(*Habeas Corpus—Order for detention.*) The Court thought it had no jurisdiction to order a party, who was a prisoner in the Queen's Bench, to be brought up on habeas corpus that he might be recommitted for non-payment of costs under a previous order, but it made an order for his detention under the 1 & 2 Vict. c. 110, s. 18.—*Exp. and re Britten*, 335.

And see **JOINT AND SEPARATE CREDITORS**, 2; **LEASE**, 2.

LEASE.

1. (*Merger.*) The bankrupt, being the lessee under a lease for forty-six years, subject to a former lease for twenty years, deposits it by way of equitable mortgage. He afterwards purchases the remainder of the term granted by the first lease, and deposits that lease also with the same party for securing a further sum: Held, that the first lease was not, under these circumstances, merged in the second, and that the depositaries were good equitable mortgagees under both deposits.—*Exp. Whitbread, re Dix*, 415.

2. (*Parol lease—Costs.*) A parol lease is within the 6 Geo. 4, c. 16, s. 75, so as to entitle the lessor to call upon the assignees to elect whether they will take it or not. *Quare*, whether in the case of such application the Court has jurisdiction to give the landlord his costs.—*Exp. Hopton re Reeves*, 347.

LIEN. See **SOLICITOR**, 2.

LUNATIC. See **CERTIFICATE**.

MARRIED WOMAN.

(*Proof against husband's estate.*) A married woman admitted to prove by her next friend against her husband's estate for the value of her separate property, which had been transferred to him with her consent, but, as she alleged, upon an agreement that he should hold it as her trustee, which agreement she was to prove.—*Exp. Wells, re Whitmore*, 504.

And see **PROOF**, 2.

MARKSMAN. See **PRACTICE**, 7.

MERGER. See **LEASE**, 1; **SECURITY**.

MISNOMER. See **PRACTICE**, 4, 5, 6.

MORTGAGE.

1. (*Redemption—Where more than one.*) Where the bankrupt had mortgaged to the same person several properties, the assignees were not allowed to redeem one without the others.—*Exp. Alsager, re Breeds*, 328.

2. (*Tacking judgment.*) A mortgagee by demise enters up judgment against the mortgagor on another debt, and dies. His executors take from the mortgagor a memorandum empowering them to hold the title deeds of the mortgaged property as a security for a part of the judgment debt, in addition to the original mortgage debt: Held, on the mortgagor becoming bankrupt, that the executors might, as against a second mortgagee, tack the whole of the judgment debt to the mortgage.—*Exp. Cox, re Squibb*, 486.

OFFICIAL ASSIGNEE.

1. (*Detainer of documents.*) An official assignee, who is removed, has no right to retain the papers belonging to the bankrupt's estate in his hands until he is remunerated for his services under the fiat; and if he refuse to hand them over to his successor, he will be ordered to deliver them up, with costs.—*Exp. Graham, re Mott*, 290.
2. (*Detainer of money.*) Where an official assignee, who had been removed from that office, neglected to pay over a sum of money which he had received under the fiat, he was ordered forthwith to pay the same, together with interest at the rate of 20l. per cent. for the time of his retention of the money.—*Exp. and re Turner*, 481.

ORDER AND DISPOSITION.

(*Assignment of debts—Change of firms.*) L. and C. employed packmen to travel round various districts in the country to sell their goods, in the course of which dealings were had with 3500 customers. L. and C. dissolved their partnership, of which notice was given in the Gazette, and sold the debts owing on these different rounds to the new firm of S. and C., which continued the same course of dealing, and some of the bills of parcels delivered to the customers by one of the packmen were altered in the heading from the firm of L. and C. to that of S. and C.; but it did not appear that any express notice was given to the customers of the assignment of the debts from the old to the new firm. Both firms became bankrupts: Held, under these circumstances, that there was not such proof of want of notice to the different debtors, of the assignment of the debts from the old to the new firm, as to raise the inference that the debts continued in the order and disposition of the old firm.—*Exp. Woodgate, re Little*, 394.

PARTNERSHIP.

(*Implication of.*) Where there had been a treaty for a partnership between the bankrupt and A., and articles drawn up which A. had refused to sign, but one of such articles was that A. should advance a sum of 2000l., and A. did in fact make such an advance, and the addition of "and Co." was made to the name of the firm, the advance appearing to have been taken as a loan, and the addition to have been made without the concurrence of A.: Held, that there was no partnership.—*Exp. Turquand, re Vanderplank*, 339.

PETITIONING CREDITOR. See *COSRS.*

PLEADING.

(*Rejection of proof.*) A petition, complaining of the rejection of proof, neither sets forth the grounds of the rejection, nor states that none were assigned: Held, the petition might nevertheless be heard.—*Exp. Mudie, re James*, 490.

PRACTICE.

1. (*Affidavit—Time to answer.*) Where the petitioner made out a new case in his affidavits in reply, which were filed only three days before the petition was set down for hearing, the Court permitted the hearing to be postponed in order that the respondent might have time to answer the affidavits, but as he had given no notice of the application he was ordered to pay the costs of the day.—*Exp. Rogers, re Jones*, 503.
2. (*Auxiliary fiat.*) Where the bankrupts were bankers at Manchester, having

a large circulation at Macclesfield, an auxiliary fiat was granted to the latter place.—*Re Daintry*, 257.

3. (*Evidence—Production of proceedings.*) Assignees under a separate fiat ordered to produce the proceedings under that fiat at the opening of a joint fiat against the same bankrupt and his partners, for the purpose of proving the act of bankruptcy, although the commissioners had declined to order the proceedings to be produced.—*Exp. Sharp, re Chadwick*, 350.
4. (*Joint fiat.*) *Semble*, that a joint fiat will not be annulled on account of a *misnomer* in it of one of the bankrupts, by the omission of one of his christian names.—*Exp. and re Richards*, 493.
5. (*Misnomer—Proof of.*) To prove the existence of a *misnomer*, it is not enough to state that the trader was baptized by, and always adopted, another name than that by which he is described. It must appear that he was generally known by such other name.—*S. C.*
6. (*Misnomer—1 & 2 Vict. c. 110.*) *Quære*, whether a *misnomer* of a trader, in proceedings under 1 & 2 Vict. c. 110, s. 8, is a sufficient ground for annulling a fiat founded upon them.—*S. C.*
7. (*Petition of marksman.*) The Court will hear the petition of a marksman, although the attestation of it is defective in not stating that the petition had been read to him, if the petitioner's affidavit, being an echo of the petition, is expressed in the *jurat* to have been read to him.—*Exp. Washbrook, re Brown*, 490.
8. (*Staying advertisement.*) *Quære*, whether the Court will, on the application of the bankrupt, make an order to stay the advertisement where the bankrupt has presented no petition to annul the fiat.—*Exp. and re Pickstock*, 319.
9. (*Staying certificate.*) A petition to stay a certificate should not be presented till after the certificate has been signed and taken into the office for allowance.—*Exp. Crosse, re Bedingfield*, 308.
10. (*Same.*) Where a party has not come in as creditor under the fiat, he cannot petition to stay the certificate.—*Exp. Morton, re Proctor*, 442.

And see ANNULING.

PROOF.

1. (*Joint and several covenant.*) A. and B., the bankrupts, had joined with C. as their surety in granting an annuity, and the three jointly and any two of them separately had covenanted that the three or some or one of them should pay the annuity: Held, that the whole value of the annuity might be proved as a debt against A. and B.—*Exp. Pennell, re Kearsley*, 273.
2. (*Security on wife's property.*) Where the bankrupt and his wife executed a power of appointment of the wife's estate to a creditor as a security for a debt due from the bankrupt: Held, that the creditor might prove the whole debt without giving up the security; it being incumbent on him to recover what he could from the bankrupt's estate before he resorted to the property of the wife.—*Exp. Hedderly, re Hicklin*, 487.

REPUTED OWNERSHIP.

1. (*Bankrupt executor de son tort.*) Where the bankrupts, being two of the next of kin of an intestate, get possession of her effects, being stock in trade and fixtures, and carry on the business for some time, but without taking out administration, and after their bankruptcy administration is taken out by another of

the next of kin: Held, that the goods were not within the reputed ownership—*Exp. Thomas, re Thomas*, 294.

2. (*Evidence of reputation.*) A., a merchant in London, on the 17th February, bought of B., an oil merchant at Hull, ten tons of oil, which was paid for by A.'s acceptance for the amount of the price. Upon the completion of the purchase the oil was drawn off from the cisterns in which B. kept his stock, and put into nineteen casks, which were numbered and marked with A.'s initial, and removed into another warehouse, called the shipping warehouse, to await A.'s orders as to the shipment. On the 9th March A. demanded the delivery of the oil, but B., having then suspended payment, said that he could not deliver the oil without authority. On the 3d April a fiat was issued against B.: Held, that the oil was not in the possession of B. as reputed owner within the meaning of the 6 Geo. 4, c. 16, s. 72, it being necessary to prove some reputation of ownership besides the mere fact of possession to bring a case within the provisions of that enactment.—*Exp. Dover, re Popple*, 259.
3. (*Fixtures.*) The bankrupts purchased certain copyhold property with various fixtures erected thereon, which were in law removable as between landlord and tenant as well as on the principle of the benefit of trade. They afterwards mortgaged the property, together with all the fixtures, describing them precisely in the words used in the purchase deed. After the mortgage they erected on the premises some other fixtures of the like nature, and continued in the possession of the whole property up to the period of their bankruptcy: Held, that all these fixtures passed to the mortgagees as parcel of the mortgaged estate, and were not at the time of their bankruptcy within the meaning of the 72d section of the 6 Geo. 4, c. 16.—*Exp. Reynal, re Gye*, 443.
4. (*Shares in a company.*) Shares of the bankrupt in a joint stock company, of which he was a director, mortgaged, by deposit of the certificates, but with an express agreement that notice of the assignment should not be given to the other directors: Held, to be in the reputed ownership, though it was contended on the authority of *Duncan v. Chamberlayne*, 11 Sim. 123, that notice to one shareholder was notice to the company.—*Exp. Nutting, re Hamlet*, 302.

And see ORDER AND DISPOSITION.

SCANDAL.

(*Charge without evidence.*) A charge unsupported by evidence, though it might be pertinent if proved as a charge of misconduct against a clerk claiming his wages in full, will be treated as scandalous and impertinent.—*Exp. Hampson, re Burkill*, 462.

SECURITY.

(*Merger.*) Where a covenant was given for payment of an annuity and also a warrant of attorney, upon which a memorandum was written that it was to be as a "collateral security:" Held, that the covenant was not merged in the judgment which was entered up under the warrant.—*Exp. Pennell, re Kearsley*, 273.

And see PROOF, 2.

SOLICITOR.

1. (*Costs of trust deed.*) Where a solicitor was employed by the trustees under a trust deed in the preparation of the deed and the execution of the trusts, and the trustees were afterwards chosen assignees under a subsequent fiat in

bankruptcy issued against the party who had assigned his effects under the trust deed : Held, that the solicitor could not retain a sum which had come to his hands since the bankruptcy in satisfaction of his charges relating to the trust deed.—*Exp. Dean, re Gibson*, 438.

2. (*Lien for indemnity.*) Held, that the solicitor to the fiat had no lien upon money of the bankrupt in his hands in respect of an indemnity given five years ago to the sheriff for relinquishing possession of the goods ; no authority from the assignees being shown for giving the indemnity, and the money appearing to have been paid by the solicitor on account of it.—*Exp. White, re Hallin*, 436.

And see CONCERT, 2, 3 ; COSTS.

SUPPRESSION.

(*Costs—Relief.*) Pending an appeal from an order directing the admission of a proof, a dividend meeting is held, and on the assignees opposing the payment of the dividend upon this proof, it is withheld, a fund being set apart to answer it. The creditor then presents a petition, stating the non-payment of his dividend, but suppressing the fact of the fund being set apart, and praying costs personally against the commissioners. On this petition and a corresponding affidavit, he obtains *ex parte* an order staying the dividend generally. The appeal being determined in his favour, held, that the suppression in the affidavit, on which the *ex parte* order was obtained, disentitled him to any relief.

Held also, that it was not a case for the commissioners to pay costs, and the petition dismissed with costs as against them.—*Exp. Davidson, re Caldecott*, 375.

SURPLUS. See JOINT AND SEPARATE CREDITORS, 2.

TRUST DEED. See SOLICITOR, 1.

UNFAIRNESS. See SUPPRESSION.

WAGES.

(*Fund for payment.*) The claim of clerks and servants for wages under 6 Geo. 4, c. 16, s. 48, attaches only after the expenses of the fiat have been provided for.—*Exp. Hampson, re Burkill*, 462.

Special Cases.

JOINT AND SEPARATE ESTATE.

(*Proof by joint and separate creditor.*) The decision of the Court of Review, 1 M. D. & G. 608, Law Mag. No. 56, that a joint creditor may prove his joint debt under a separate fiat, although there is a separate debt due to him sufficient to support a fiat, affirmed on appeal.—*Exp. Burnett, re Blake*, 357.

JOINT STOCK COMPANY.

(*Proof against shareholders.*) The decision of the Court of Review, 1 M. D. & G. 648, Law Mag. No. 56, that a joint stock company may prove against one of its bankrupt shareholders, without reference to any debts that may be owing by the company, affirmed by the Lord Chancellor.—*Exp. Davidson, re Caldecott*, 368.

ECCLESIASTICAL.

[Containing Cases in 2 Curteis, part 3.]

ABSENT PARTY.

(*Curator ad litem.*) The husband being absent in India, and a minor, the Court appointed the father *curator ad litem* to carry on the suit; no decree to be made without a proxy from the son, which was obtained, and held to be retrospective.—*Morgan* agst. *Morgan*, 679. (Consist.)

ADMINISTRATION.

1. (*Account—Lapse of time.*) An application to make an administratrix exhibit an inventory on account, after a lapse of eighteen years, rejected, with costs, under the circumstances, one being the great age of the administratrix.—*Scurrah* agst. *Scurrah*, 919. (Prerog.)
2. (*Effects of first wife.*) Administration of the effects of a former wife refused, in the absence of the next of kin of the husband, to the representative of a second wife, who had taken out administration to him.—*In the goods of Sowerby*, 852. (Prerog.)
3. (*Infant legatee.*) Administration, with will annexed, granted to attorney of guardian, elected by an infant legatee resident abroad, in preference to claims of attorney of creditor.—*Graham* agst. *Maclean*, 659. (Prerog.)

ADULTERY.

(*Desertion by husband.*) The wilful desertion of wife by husband is no bar to a suit by him for a divorce by reason of adultery. In this case the desertion was at the instance of the husband's family, he being a minor.—*Morgan* agst. *Morgan*, 679—686. (Consist.)

APPEAL.

(*Costs pending appeal.*) Motion for payment of costs pending an appeal, for the purpose of delay, reluctantly refused, the right to costs in such a case being under the 32 Hen. 8, c. 7, s. 3, whereas the proceeding in the cause was under the 2 & 3 Edw. 6, c. 13.—*Fife* agst. *Blunt*, 911. (Arches.)

• BELGIUM. See DOMICILE.

CHURCH-BUILDING ACTS. See CHURCH RATE, 4.

CHURCH RATE.

1. (*Application—Minister's salary.*) Though there may be a good custom enforceable by the Court, for levying upon the parishioners the salary of a minister elected by themselves, in virtue of an ancient right, the provision for that salary ought not to be included in the Church-rate.—*Stile* agst. *Palfrey*, 902. (Arches)
2. (*Assessment.*) It was held no objection to a rate properly made upon the occupiers, that demand for payment was in a large class of cases always made upon the landlord.—*Varty* agst. *Nunn*, 877. (Consist.)

3. (*Delegation of authority.*) Held, that parishioners might, in vestry duly convened, delegate to a committee the power of making a church-rate.—*Stile* agst. *Palfrey*, 902. (Archs.)
4. (*Division of parishes—Church-building Acts.*) Held, in the case of a parish which had been divided under the Church-building Act of the 58 Geo. 3, that upon the construction of that statute, and the 3 Geo. 4, s. 20, that the rate for the repair of one of the churches was properly confined to the division to which that church belonged.—*Varty* agst. *Nunn*, 877. (Consist.)
5. (*Past rates.*) An objection that the suit was for six rates at the same time overruled; the Court on advertent to what had been the unsettled state of important questions about church-rates as an excuse for the delay.—*Stile* agst. *Palfrey*, 902. (Archs.)
6. (*New church—Trustees.*) Where a new church had been erected expressly in substitution of the old parish church, under Act of Parliament, which vested the church in trustees for a term, with a power to raise money for the purpose of paying off the expenses of building such church, and the Act did not expressly suspend, during the said term, the levying of the ordinary parish rates, but evidently contemplated their concurrent existence of this as well as of the trustee rate: Held, that the expenses of repairing the new church were properly thrown upon the ordinary parish rates.—*Varty* agst. *Nunn*, 877. (Consist.)
7. (*Plea of other funds.*) A plea of other funds in the shape of dues, which were alleged to be the first fund for the repairs of the church, held to be no defence to a suit for church rate; it being for the parishioners to consider the existence and application of such dues before making the rate.—*Varty* agst. *Nunn*, 877. (Consist.)
8. (*Refusal—Monition.*) Upon an affidavit that a parish church was in need of repair, and that the majority in vestry had refused to make a rate, the Court directed a monition to issue against the churchwardens and parishioners to meet in vestry on a particular day and make a rate.—*Fielding* agst. *Standon*, 663. (Archs.)
9. (*Retrospective rate.*) A church rate to raise 400*l.*, of which 250*l.* was to pay debts of the previous year, incurred through the refusal of the rate in that year, pronounced against with costs.—*Ellis* agst. *Griffin*, 673. (Archs.)

CHURCHWARDEN.

(*Divided parish.*) Held, upon the construction of 16th and 73rd sections of the Church Building Act of the 58 Geo. 3, and on reference to the 1 & 2 Will. 4, c. 38, that in the case of a parish divided under the first mentioned act, churchwardens for one of the divisions were duly chosen by the inhabitants of that division only.—*Varty* agst. *Nunn*, 877. (Consist.)

COSTS. See APPEAL.

CREDITOR. See ADMINISTRATION, 3; WILL, 7.

DOMICIL.

(*Foreign law.*) Where according to the laws of the country (which was Belgium) where the party died domiciled, in the legal acceptance of the word here, such party not having acquired the status of a citizen, his testamentary dispositions were left subject to the law of his own country, and the testator was by birth a subject of this country; his will, made in the form required by English law, was admitted to probate.—*Collier* agst. *Rivals*, 855. (Prerog.)

EVIDENCE.

1. (*Collateral suit.*) In a suit for probate, which was resisted on the ground of insanity, the Court refused to allow the proceedings in another cause, where the probate of a previous will by the same testator had been resisted on the same ground, to be used as evidence.—*Wellesley agst. Vere*, 917. (Prerog.)
2. (*Production of documents—Witness.*) It is no ground for compelling a witness to produce books and documents that he has in his deposition referred to certain entries in them, and given copies of them as required by an interrogatory; so held in a case where the witness was the solicitor who drew the will, and was examined by the party opposing it.—*Goodrich agst. Jones*, 671. (Prerog.)

And see *WILL*, 8.

EXCOMMUNICATION.

(*Disability—Wesleyan Methodist.*) The act 53 Geo. 3, c. 127, having exempted excommunicated persons from all civil disabilities, entitles them to sue in the Ecclesiastical as well as in any other Courts,

Quere, whether a Wesleyan Methodist is ipso facto excommunicated by virtue of the 12th canon of 1603.—*Mastin agst. Escott*, 692. (Archies.)

FOREIGN LAW. See *DOMICIL*.

HUSBAND AND WIFE. See *ADMINISTRATION*, 2.

LAY BAPTISM.

(*Burial.*) Baptism administered by a layman with the form of words prescribed by the rubric is sufficient in law to entitle the person baptised to the rites of Christian burial in his parish church, and a clergyman refusing burial under such circumstances was suspended for three months under the 68th canon, no discretion being left by the canon as to the amount of punishment.—*Mastin agst. Escott*, 692. (Archies.)

Affirmed on appeal by the Privy Council.

MARRIAGE.

(*Publication of banns—Suppression of name.*) Where, with the knowledge of both parties, one of the Christian names of the husband had been suppressed in the publication of the banns, with the view of keeping the husband's father in ignorance, the marriage was declared null.—*Breaty agst. Reed*, 833. (Consist.)

MINISTER. See *CHURCH RATE*, 1.

PRACTICE.

(*Bankrupt party—Costs.*) A party propounding a will having become bankrupt, was directed to give security for costs.—*Goldie agst. Marray*, 797. (Prerog.)

And see *ABSENT PARTY*; *APPEAL*; *EVIDENCE*, 1.

PRODUCTION OF DOCUMENTS. See *EVIDENCE*, 2.

PROXY. See *ABSENT PARTY*.

SOLICITOR AND CLIENT.

1. (*Privileged communication.*) Communication made by a party in the cause to a solicitor whom such party had requested to act for him, and made under the impression that such request had been acceded to, held privileged.—*Smith agst. Fell*, 667. (Prerog.)

2. (*Privileged communication—Witness.*) Communications between the solicitor of a party and a witness, on the subject of the evidence to be given by such witness in the cause, held not privileged, though it might have been otherwise if the client

himself had derived the information from the witness and communicated it to the solicitor.—*Mackenzie agst. Yeo*, 866. (Prerog.)

WESLEYAN METHODIST. See EXCOMMUNICATION.

WILL.

1. (*Attestation by legatee.*) Where a will having been attested by a legatee was afterwards sufficiently attested by other witnesses, the Court refused an application to strike out the name of the legatee from the attestation, reserving the point to be considered in a suit for the legacy.—*In the goods of Mitchell*, 916. (Prerog.)
2. (*Attestation—Reference.*) Testator made his will, duly executed and attested; he then made a codicil, which was not attested, but he made another codicil on the other side of the same paper, which he described as "a second codicil." Both codicils admitted to probate.—*In the goods of Smith*, 796. (Prerog.)
3. (*Attestation—Signature.*) Where the will was signed after the witnesses had subscribed their names, though in their presence, it was held insufficient.—*In the goods of Olding*, 865. (Prerog.)
4. (*Same*) Probate refused of a paper produced by deceased to three witnesses, who subscribed it, but of whom two did not see the deceased sign, or knew that he had signed the paper.—*In the goods of Harrison*, 863. (Prerog.)
5. (*Mistake—Destruction.*) Probate allowed of a copy of a codicil burnt in mistake for another codicil.—*In the goods of Thornton*, 913. (Prerog.)
6. (*Mistake—Omission.*) A legacy having been omitted by mistake in the will, the testator ordered a codicil giving the legacy to be drawn up, but through weakness failed to execute it: Held, that under the present statute it could not be admitted to probate.—*In the goods of Wilson*, 853. (Prerog.)
7. (*Opposition by creditor.*) A creditor is not entitled to oppose the probate of a will, unless he has previously obtained administration.—*Menzies agst. Pulbrook*, 845. (Prerog.)
8. (*Parol evidence—Cumulative codicils.*) The fact of there being two codicils to a will, both making a provision for the same party, does not raise with it sufficient ambiguity to admit of parol evidence as to the intention of the testator to substitute one codicil for the other, upon the question of giving probate to both.

Quære, how far in such cases a Court of probate is bound by the same rules of evidence as a Court of construction.—*Thorne agst. Rooke*, 799. (Prerog.)
9. (*Reference to unattested papers.*) A reference in the will to "other instructions," without further description of the paper containing them, not sufficient to entitle such paper to probate, though the testatrix also wrote upon such paper a memorandum without attestation, stating those were the instructions referred to in the will.—*In the goods of Sotheron*, 831. (Prerog.)
10. (*Revocation by marriage.*) Marriage and birth of a child are an absolute revocation of a will made previous to the 1st January, 1838.—*Walker agst. Walker*, 854. (Prerog.)
11. (*Revocation—New statute.*) A will made before the 1st of January, 1838, when the new Will Act came into operation, held to be not revoked by marriage subsequent to that day.—*In the goods of Shirley*, 657. (Prerog.)
12. (*Revocation by tearing.*) A will torn in four pieces by the testator admitted to probate with the consent of the next of kin, upon affidavit that it was torn in a fit of anger by the testator, who afterwards repented the act and had the will stitched together.—*In the goods of Colberg*, 832.

And see EVIDENCE, 1.

HOUSE OF LORDS.

[Containing Cases in 7 Clark and Fennelly, Parts 3 and 4, omitting Cases noticed in former Digests.]

APPEAL.

(*Costs.*) Parties having a good ground of defence, which they do not bring before the notice of the Court below, though it may have been stated in the pleadings, will not get their costs of the appeal though they succeed in reversing the adverse decision.—*Godson v. Hall*, 759.

PARTIES.

(*Scotch law, Right of action on—Contract.*) Semble, that the rule of law according to which none but the parties to the contract on one side, or those representing the whole interest of such parties, can sue the parties on the other side, obtains in Scotland, as well as in England.—*Stewart v. Gibson*, 707.

PRACTICE.

(*Dismissal—Costs.*) Where the appellants were not present on the appeal being called on, but he himself appeared in person, the appeal was not dismissed, but ordered to stand over, the appellant paying the costs of the day.—*Godson v. Hall*, 549.

PUBLIC OFFICER.

(*Liability of commissioners of police.*) Held that the Commissioners of the Edinburgh Police, under 2 Will. 4, c. 87, were not liable for an assault committed by a police constable who was not appointed by them.

Semble also, that the action which was brought against their clerk was defective in point of form, inasmuch as the act provided that they might be sued in the name of their clerk, in the case only of acts done or ordered by them which was not alleged here.—*Thompson v. Mitchell*, 564.

SLAVE TRADE.

(*Evasion of Law—Unity of transactions.*) An American ship was fitted out at Liverpool, and sent to the coast of Africa, to be used in the traffic of slaves, but the cargo of such ship was legal merchandize. A few days after, an English ship was sent to the same station with a cargo of arms and ammunition, to be at the disposal of the supercargo of the other ship. On the arrival of the two ships at their destination the cargo of the second was transhipped to the first, which was shortly afterwards seized and condemned as contraband: Held, that the whole transaction was illegal, and that no action for contribution or account in regard thereto could be maintained by any of the parties concerned against the others.—*Stewart v. Gibson*, 707.

SOLICITOR AND CLIENT.

(*Gratuitous employment.*) In a transaction where a lease was assigned as a security for a loan, a solicitor, generally acting for the borrower in other cases as well as in this, acted also for the lender, but did not make to the latter any charge or his services: Held, that he was nevertheless liable to the latter, and his representatives, for a failure of the security occasioned by want of notice to the lessor.—*Donaldson v. Haldane*, 762.

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ABSTRACT OF PUBLIC GENERAL STATUTES.

(5 & 6 VICT.—*continued.*)

CAP. 47.—An Act to amend the Laws relating to the Customs. [9th July, 1842.]

CAP. 48.—An Act to provide for the Relief of the Poor in the Forest of Dean and other Extraparochial Places in and near the Hundred of Saint Briavel's in the County of Gloucester. [9th July, 1842.]

CAP. 49.—An Act to amend the Laws for the Regulation of the Trade of the British Possessions abroad. [16th July, 1842.]

CAP. 50.—An Act to continue, until the First Day of October, One thousand eight hundred and forty-three, the Exemption of Inhabitants of Parishes, Townships, and Villages from Liability to be rated as such, in respect of Stock in Trade or other Property, to the Relief of the Poor. [16th July, 1842.]

The 3 & 4 Vict. c. 89, further continued until the 1st October, 1843.

CAP. 51.—An Act for providing for the further Security and Protection of her Majesty's Person. [16th July, 1842.]

S. 1. In all cases of high treason in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding, of the queen, and in all cases of misprision of such treason, where the overt act alleged shall be any attempt to injure the person of the queen, the party charged shall be indicted, arraigned, tried, and attainted in the same manner, according to the same course of trial, and on the like evidence, as if charged with murder; and the provisions of the 7 & 8 Will. 3 and 7 Ann. shall not extend to such cases.

S. 2. Persons who shall wilfully discharge or attempt to discharge, or point, aim, or present, at or near to the person of the queen, any fire-arms or other arms whatsoever, whether containing any explosive or destructive material or not; or who shall discharge, &c. any explosive substance or material near the queen's person, or wilfully strike or strike at or attempt to strike or strike at the queen's person with any offensive weapon or otherwise, or who shall wilfully throw or attempt to throw any thing at or upon the queen's person, with intent to injure her person, or to break the public peace, or whereby it shall be endangered, or with intent to alarm her majesty; or who shall produce or have any arms, &c. near the queen's person, with intent to use the same to injure her person, or to alarm her; shall be guilty of a misdemeanor, and liable to be transported for seven years, or imprisoned for not more than three years, and whipped not more than thrice.

CAP. 52.—An Act to indemnify Witnesses who may give Evidence before the Lords Spiritual and Temporal on a Bill to exclude the Borough of Sudbury from sending Burgesses to serve in Parliament. [16th July, 1842.]

CAP. 53.—An Act to encourage the Establishment of District Courts and Prisons. [30th July, 1842.]

S. 1. The justices of any county, and of any borough within the provisions of the 5 & 6 Will. 4, c. 76, may agree with other justices for building or enlarging of prisons, to be used as district prisons, and for the expenses of the maintenance, &c. of the prisoners therein; and such justices may commit alleged offenders to such prisons.

S. 2. Repeals all enactments authorizing such agreement to be made by the council of any borough at a quarterly meeting ; but not so as to affect existing contracts.

S. 3. Monies to be raised in the same manner as other monies for like purposes.

S. 4. Empowers justices in quarter sessions to appoint a committee of justices to make such agreements ; s. 5 gives a similar power to the councils of boroughs ; and s. 6 provides that the committees so appointed shall form one committee.

Ss. 7 and 8 particularize certain matters which are to be stated in the agreement.

S. 9. Agreements to be approved by the justices and councils separately, and confirmed by the crown ; if not approved, to be referred back to the joint committee.

S. 10. Agreements, when approved, to be laid before the Secretary of State ; to set forth the salary to be paid to recorders for any additional duties thereby imposed ; and may be confirmed by order in council : and such prison, when testified by the secretary of state as fit for the reception of prisoners, to be thenceforth used as a common gaol and house of correction.

S. 11. Joint committee afterwards to reassemble for carrying the purposes of the agreement into execution, to appoint a clerk and fix his salary, &c. ; but not to do any act unless there be present at least one justice representing each contracting party.

Ss. 12 and 13. Powers of joint committee as to purchasing lands, &c., making contracts for works, receiving plans and estimates, &c.

S. 14. Provision for auditing accounts.

S. 15. Committee to appoint a governor, chaplains, medical officer, matron, and other necessary officers and servants, with power of suspension and dismissal.

S. 16. Certificate of the completion of the prison to be sent by the committee to the secretary of state, who may direct the prison to be thenceforth used as a prison under this act, and the removal of prisoners thereto.

S. 17. Committee to hold from time to time a court of gaol sessions, and to exercise all the powers vested in the sessions as to county gaols or houses of correction.

S. 18. The prison, for the purposes of jurisdiction, to be deemed within both the county and the borough.

Ss. 19, 20, 21. Provisions as to mode, time and place of holding gaol sessions.

S. 22. Provides for the appointment of visiting justices, and s. 23, of a treasurer.

S. 24. Examination and verification of accounts ; copies thereof to be laid before quarter sessions and council.

S. 25. Provision as to making orders for money.

S. 26. Justices and council may appoint committees to inspect books and documents relating to the prison and its management.

S. 27. Reports to the gaol sessions, time of making.

S. 28. Proceedings of the gaol sessions to be notified within fourteen days to the secretary at state.

S. 29. The like reports and returns to be made as are directed by statute to be made as to county prisons.

S. 30. Penalties for offences respecting the prison to be paid to the treasurer of the gaol sessions for defraying expenses of the prison.

S. 31. Provision for revision of the agreement, on the termination of the time limited by it.

S. 32. Provision for settlement of disputes by arbitration.

S. 33. Power to committee to recommend alterations from time to time.

S. 34. Committee to be re-elected on the 9th November in every year.

S. 35. Powers of 4 Geo. 4 and 7 Geo. 4, c. 18, as to the sale of sites of old prisons, extended to this act.

S. 36. One court to be held for the united district, and its jurisdiction to extend over the whole district, and the recorder of the borough and clerk of the peace to the recorder, &c. for the united district; and depositions, recognizances, &c., relating to prisoners committed to the district prison to be returned to such clerk of the peace.

S. 37. Jurors to be taken from the whole district for the borough sessions.

S. 38. Copy of list of jurors within the district to be sent by the clerk of the peace for the county to the clerk of the peace for the borough, and such jurors to be within the 5 & 6 Will. 4, c. 76.

S. 39 provides for formation of jurors' book.

S. 40. Jurors attending at borough sessions to have the like exemptions as at county sessions.

S. 41. In cases where more than one borough is a party to the agreement, the district to be divided amongst the boroughs for the trial of prisoners, and the previous provisions of the act to apply to such divisional districts.

S. 42. Provision for defraying expenses of district courts, and of prosecutors, witnesses, &c.

S. 43. Recorder of united district, &c., restrained from trying any of the offences named in the 5 & 6 Vict. c. 38.

S. 44. This act not to affect the corporations of Birmingham, Manchester, or Bolton.

S. 45. Interpretation clause.

S. 46. Act to commence 1st September, 1842.

S. 47. Act may be amended or repealed this session.

CAP. 54.—An Act to amend the Acts for the Commutation of Tithes in England and Wales, and to continue the Officers appointed under the said Acts for a Time to be limited.

[30th July, 1842.]

S. 1. Repeal of the 5 Vict. c. 7, as to the limitation of the period of the tithe commission: and the commission continued till 31st July, 1847, and to the end of the then next session of parliament.

S. 2. Agreements for commutation of tithes may be made pending proceedings towards an award under the compulsory clauses.

S. 3. Power to parties to make a supplemental agreement as to the time of commencement of the rent-charge: such agreement to be confirmed by the commissioners, and a copy deposited according to the 6 & 7 Will. 4, c. 71.

S. 4. In making special adjudications under that act, an account may be taken of parochial agreements.

S. 5. Powers to commissioners for defining glebe lands where they cannot be identified, and for exchanging glebe for other lands.

S. 6. Power of giving land instead of tithes or rent-charge extended.

S. 7. Power of confirmation of agreements made before the 6 & 7 Will. 4, c. 71, for the giving land for tithes.

S. 8. Power of commissioners to charge expenses of commutation on benefices extended.

S. 9. Provisions for settling questions of arrears and costs in suits in equity.

S. 10. The stat. 2 & 3 Will. 4, c. 100, not to have any operation as to any award of the commissioners on matters as to which any such suit shall be pending as would have prevented the operation of that act.

S. 11. Provision for fixing the same days of payment of all the parts of the rent-charge.

S. 12. Power to owner of rent-charge to let land taken possession of for non-payment thereof, for a term not exceeding a year.

S. 13. Power, in certain cases, to use tithe commutation maps for parochial purposes.

S. 14. Power of altering apportionments extended, and vested in the tithe commissioners.

S. 15. Copy of instrument of altered apportionment to be sent to the tithe office.

Ss. 16, 17. Summary remedy for enforcing payment of contribution to rent-charge, in case of land belonging to several owners.

S. 18. Provision for general avowry, in actions of replevin brought on any distress for tithe rent-charge.

S. 19. Irregularity in distress for rent-charge justly due not to vitiate the proceedings, nor make the party a trespasser ab initio, but the party aggrieved to recover satisfaction for the special damage in an action on the case; but not to recover without ten days' notice of action, or after tender or payment into court of sufficient amends.

S. 20. This act to be construed as part of 6 & 7 Will. 4, c. 71; and all provisions as to copyhold land to apply to lands of customary tenure or subject to arbitrary fine; and all provisions as to glebe land to apply to all land held by any spiritual person in right of his benefice.

S. 21. Act may be amended or repealed this session.

CAP. 55.—An Act for the better Regulation of Railways, and for the Conveyance of Troops. [30th July, 1842.]

S. 1. Commencement of act.

S. 2. 3 & 4 Vict. c. 97, and this act to be construed as one act.

S. 3. Repeals provision as to two months' notice to the Board of Trade before opening railway; and s. 4 substitutes one month's notice; s. 5 imposes penalty of 20*l.* a day, if opened without notice.

S. 6. Board of Trade empowered to postpone the opening.

S. 7. Notice of all accidents attended with serious personal injury to be given to Board of Trade within forty-eight hours, under penalty of 5*l.* a day.

S. 8. Board of Trade empowered to direct returns of serious accidents whether attended with personal injury or not.

S. 9. Gates at level crossings to be kept closed across the end of the roads, unless the Board of Trade think it more conducive to the public safety, and direct that they should be kept closed across the railway.

S. 10. Railway companies to erect and maintain good fences along their lines.

S. 11. Disputes between railways having a common terminus or common line of rails to be decided by the Board of Trade.

S. 12. Powers of making branch communications with railways, and of entering upon them with locomotive engines, to be regulated by the Board of Trade: proviso, that no railway shall be considered a passenger railway if two-thirds of its annual revenue arise from the carriage of coal or other minerals.

S. 13. Provisions for the alterations of dangerous level crossings, and substitution of bridges or archways.

S. 14. Power for railway companies to enter on adjoining lands to repair accidents.

S. 15. Compulsory powers of taking land for the purposes of railways revised and extended in cases where thought necessary for the public safety by the Board of Trade.

S. 16. Carriages of greater weight than four tons may be used on railways.

S. 17. Powers of former act for the summary punishment of persons employed on railways who are guilty of misconduct extended; s. 18, sheriffs to have jurisdiction over such cases in Scotland.

S. 19. Provisions for communications to and from the Board of Trade, and service of notices, &c. on railway companies.

S. 20. Railway companies shall convey military and police forces at prices to be contracted for by them with the secretary at war.

S. 21. Interpretation clause.

S. 22. Penalties to be recovered by the crown as under 3 & 4 Vict. c. 97.

S. 23. Act may be amended or repealed this session.

CAP. 56.—An Act for further amending the Laws relating to the Customs.

[30th July, 1842.]

CAP. 57.—An Act to continue until the Thirty-first Day of July, One thousand eight hundred and forty-seven, and to the End of the then next Session of Parliament, the Poor Law Commission; and for the further Amendment of the Laws relating to the Poor in England.

[30th July, 1842.]

S. 1. Poor Law Commission continued to 31st July, 1847, and to the end of the then next session of parliament.

S. 2. Number of assistant commissioners in England, after 31st December, 1842, limited to nine; but professional persons, not being assistant commissioners, may be appointed to make special inquiries; oath to be taken by such persons; in special inquiries on charges of misconduct, the parties may be heard by counsel.

S. 3. No general rule of the commissioners may be altered by any particular rule for a single parish or union, unless with the approval of the secretary of state.

S. 4. Orders for suspending or dismissing any paid officers may be made to come into operation, in cases of urgency, sooner than in fourteen days.

S. 5. Guardians of a parish or union empowered to set occasional poor to work, in return for his food and lodging, for a limited time; penalty for refusal to work, &c.

S. 6. Guardians invested with the like powers, with respect to lunatics, as overseers under 9 Geo. 4, c. 40.

S. 7. Where a parish is more than four miles distant from the place of meeting of the guardians, it may be formed into a district for the purposes of relief.

S. 8. Power to commissioners to determine disputes as to the right of election of guardians; orders for that purpose not to be removable by certiorari except on application made the next term.

S. 9. Provision for resignation of candidates put in nomination as guardians.

S. 10. Provision for continuance of former guardians in office in case of no election.

S. 11. Power to commissioners to accept resignation of any guardian elected, and to order new election.

S. 12. In case of any vacancy, the remaining guardians empowered to act.

S. 13. No defect in qualification or election to vitiate the proceedings of de facto guardians.

S. 14. Paid officers, or such as have been dismissed within five years, not to be capable of serving as guardians.

S. 15. Ex officio guardians declared not to be incompetent to act as justices in cases where the guardians are interested.

S. 16. Corporate powers given to guardians and distinct boards.

S. 17. Mode of application to justices, &c. by boards of guardians: power to them to authorize their officers to take legal proceedings.

S. 18. Former acts and this to be construed as one act: interpretation of certain words, &c.

S. 19. Act limited to England and Wales.

S. 20. Act may be amended or repealed this session.

CAP. 58.—An Act for further suspending, until the first day of October, One thousand eight hundred and forty-three, the Operation of the new Arrangement of Dioceses, so far as it affects the existing Ecclesiastical Jurisdictions.

[30th July, 1842.]

CAP. 59.—An Act to continue, until the first day of August, One thousand eight hundred and forty-three, an Act for authorizing her Majesty to carry into immediate execution, by Orders in Council, any Treaties for the Suppression of the Slave Trade.

[30th July, 1842.]

CAP. 60.—An Act to continue, until the first day of October, One thousand eight hundred and forty-three, certain Turnpike Acts.

[30th July, 1842.]

CAP. 61.—An Act to provide for the better Government of South Australia.

[30th July, 1842.]

CAP. 62.—An Act to extend the provisions of an Act of the fourth year of her present Majesty, for enabling the Commissioners of Wide Streets to sell, and her Majesty to purchase, certain Hereditaments in the city of Dublin, on the North Bank of the river Anna Liffey.

[30th July, 1842.]

CAP. 63.—An Act to continue, until the First Day of August, One thousand eight hundred and forty-three, an Act for carrying into effect a Convention between her Majesty and the King of the French, relative to the Fisheries on the Coast of the British Islands and of France.

[30th July, 1842.]

CAP. 64.—An Act for regulating the Priorities of Monies authorized to be charged on a Fund called "The London Bridge Approaches Fund."

[30th July, 1842.]

CAP. 65.—An Act to divide the Forest of Dean, in the county of Gloucester, into Ecclesiastical Districts.

[30th July, 1842.]

CAP. 66.—An Act for further regulating the Preparation and Issue of Exchequer Bills.

[30th July, 1842.]

CAP. 67.—An Act for the better regulating the Number of Prisoners admitted to the General Prison at Perth.

[30th July, 1842.]

CAP. 68.—An Act to amend and continue, to the Twenty-seventh Day of July, One thousand eight hundred and forty-three, and to the End of the next Session of Parliament, an Act of the third and fourth years of her present Majesty, for the more effectual Prevention of Frauds and Abuses committed by Weavers, Sewers and other Persons employed in the Linen, Hempen, Union Cotton, Silk, and Woollen Manufactures, in Ireland, and for the better Payment of their Wages.

[30th July, 1842.]

CAP. 69.—An Act for perpetuating Testimony in certain Cases.

[30th July, 1842.]

S. 1. Bills in Chancery to perpetuate testimony may be filed by persons claiming honours, titles, &c. contingent on future events.

S. 2. Attorney-General to be party defendant in all such suits in which the crown has any interest.

CAP. 70.—An Act for amending the Laws relating to the Payment of Out-Pensioners of Chelsea Hospital. [30th July, 1842.]

CAP. 71.—An Act to establish Military Savings Banks. [30th July, 1842.]

CAP. 72.—An Act to suspend, until the Thirty-first Day of August, One thousand eight hundred and forty-three, the making of Lists and the Ballots and Enrolments for the Militia of the United Kingdom. [30th July, 1842.]

CAP. 73.—An Act to continue, until the Thirty-first day of July, One thousand eight hundred and forty-three, and to the End of the then Session of Parliament, an Act for amending the Law for the trial of Controverted Elections. [30th July, 1842.]

CAP. 74.—An Act to amend an Act of the Second and Third years of his late Majesty, "to amend the Representation of the People in Ireland," in the respect of the Right of Voting in the University of Dublin. [30th July, 1842.]

CAP. 75.—An Act to remove Doubts touching the Law relating to Charitable, Pawn or Deposit Offices in Ireland. [30th July, 1842.]

CAP. 76.—An Act for the Government of New South Wales and Van Diemen's Land. [30th July, 1842.]

CAP. 77.—An Act to enable Grand Juries, at the ensuing Summer and Spring Assizes, to make certain Presentments in Counties of Cities and Towns in Ireland; and to remove Doubts as to the Jurisdiction of Justices of the Peace in Places recently annexed to Counties at large in Ireland. [5th August, 1842.]

CAP. 78.—An Act for effecting an Exchange between her Majesty and the Provost and College of Eton. [5th August, 1842.]

CAP. 79.—An Act to repeal the Duties payable on Stage Carriages and on Passengers conveyed upon Railways, and certain other Stamp Duties in Great Britain, and to grant other Duties in lieu thereof; and also to amend the Laws relating to the Stamp Duties. [5th August, 1842.]

CAP. 80.—An Act to grant Relief from the Duties of Assessed Taxes in certain cases, and to provide for the assessing and charging the Property Tax on Dividends payable out of the Revenue of Foreign States. [5th August, 1842.]

CAP. 81.—An Act to transfer the Collection and Management of the Duties on Certificates to kill Game in Ireland, to the Commissioners of Excise. [5th August, 1842.]

CAP. 82.—An Act to assimilate the Stamp Duties in Great Britain and Ireland, and to make Regulations for collecting and managing the same until the Tenth Day of October, One thousand eight hundred and forty-five. [5th August, 1842.]

CAP. 83.—An Act to abolish the Court of Saint Briavel's, and for the more easy and speedy Recovery of Small Debts within the Hundred of Saint Briavel's, in the County of Gloucester. [5th August, 1842.]

CAP. 84.—An Act to alter and amend the Practice and Course of Proceeding under Commissions in the nature of Writs De lunatico inquirendo. [5th August, 1842.]

S. 1. Empowers the lord chancellor to appoint two Commissioners, being barristers or serjeants at law of not less than ten years' standing; and in future all commissions of lunacy shall be directed to such commissioners or one of them.

S. 2. Commissioners' oath.

S. 3. Power to the lord chancellor to direct that the commissioners shall per-

form the duties relating to inquiries and matters in lunacy usually referred to the masters in Chancery.

S. 4. Commissioners to be *ex officio* visitors of lunatics.

S. 5. Commissioners so to be appointed to execute commissions of lunacy, conduct inquiries connected with lunatics or their estates, &c. separately or together, and at such places, times and manner as the lord chancellor shall direct : proviso, enabling him to issue commissions to special commissioners in addition to the commissioners under this act.

S. 6. Power to the lord chancellor to appoint successors on the death, resignation or removal of any commissioner.

S. 7. Power to the lord chancellor to make orders for regulating the mode of proceeding before the commissioners, and the practice in lunacy : a copy of such orders to be laid before Parliament.

S. 8. Power to the lord chancellor to make orders for regulating the number of jurors to try inquests on commissions ; but no inquisition to be found by less than twelve.

S. 9. Provides for appointment of officers, clerks and messengers.

S. 10. Abolishes the office of clerk of the custodies of lunatics and idiots.

S. 11. Lord chancellor to fix tables of fees to be taken by the clerk to the commissioners, and by the secretary of lunatics, to be paid into the Suitors' Fee Fund.

S. 12. All fees formerly payable to the lord chancellor to be paid to the account and applied as part of the Suitors' Fee Fund.

Ss. 13, 14, 15, and 16, provide for the payment of the salaries of the commissioners ; of the officers, clerks and messengers, &c. ; for retiring annuities to commissioners in case of disability, and for compensation to officers whose offices are abolished or affected by this act.

S. 17. Interpretation clause.

S. 18. Act may be amended or repealed this session.

CAP. 85.—An Act to amend the Law relative to Legal Proceedings by certain Joint Stock Banking Companies against their own Members, and by such Members against the Companies. [5th August, 1842.]

S. 1. Stat. 1 & 2 Vict. c. 96, as extended by 3 & 4 Vict. c. 11, made perpetual.

S. 2. Act may be amended or repealed this session.

CAP. 86.—An Act for abolishing certain Offices on the Revenue Side of the Court of Exchequer in England, and for regulating the Office of her Majesty's Remembrancer in that Court. [5th August, 1842.]

S. 1. Abolishes, from 1st January, 1843, the offices of first and second secondaries, of sworn and side clerks, of register and bagbearer, in the remembrancer's office ; saving the right of the sworn and side clerks to practise as attorneys.

S. 2. The remembrancer to perform the duties heretofore performed by the first and second secondaries and sworn and side clerks of his office ; subject to regulation by the orders of the court.

S. 3. Treasury, by warrant, to regulate the establishment of the remembrancer's office, and fix the salaries.

Ss. 4, 5. Table of fees to be established by Court of Exchequer, and account of fees to be kept by the remembrancer.

S. 6. Power to the Treasury to award compensation to officers affected by this act.

S. 7. Attorneys admitted in any of the superior Courts to be admissible to practise on the revenue side of the Court of Exchequer.

S. 8. Writs and other process issuing out of the remembrancer's office may be made returnable on a day certain in term or vacation, and proceedings had thereon, with the same validity as if tested and made returnable in term, according to the course of the Exchequer; proviso, that nothing herein shall extend to alter the time for filing any pleadings, or to authorize the entering up any judgment in vacation; and where any person shall enter a claim to goods seized under an extent, or returned as forfeited (which may be done in vacation), the further proceedings shall be only according to the ordinary practice of the Court.

S. 9. Revenue orders heretofore made at the sittings after term, may be made at any time by a single judge.

S. 10. Act not to affect the jurisdiction of the Court of Exchequer, or the rights of the remembrancer, or of the solicitors of the revenue departments.

S. 11. Act may be amended or repealed this session.

CAP. 87.—An Act to amend and continue for Three Years, and from thence to the end of the next Session of Parliament, the Laws relating to Houses licensed by the Metropolitan Commissioners and Justices of the Peace, for the Reception of Insane Persons, and for the Inspection of County Asylums and Public Hospitals for the Reception of Insane Persons. [5th August, 1842.]

CAP. 88.—An Act to continue until the Thirty-first day of December, One Thousand eight hundred and forty-four, and to the end of the then next Session of Parliament, An Act of the Tenth year of King George the Fourth, for providing for the Government of His Majesty's Settlements in Western Australia, on the Western Coast of New Holland. [5th August, 1842.]

CAP. 89.—An Act to promote the Drainage of Lands and Improvement of Navigation and Water Power in connection with such Drainage in Ireland.

[5th August, 1842.]

CAP. 90.—An Act to Defray the Charge of the Pay, Clothing, and contingent and other expenses of the disembodied Militia in Great Britain and Ireland; and to grant allowances in certain Cases to subaltern Officers, Adjutants, Paymasters, Quartermasters, Surgeons, Surgeon's Mates, and Serjeant-Majors of the Militia, until the First day of July, One thousand Eight hundred and forty-three.

[10th August, 1842.]

CAP. 91.—An Act to amend an Act of the Second and Third Years of Her Majesty, for the Suppression of the Slave Trade. [10th August, 1842.]

CAP. 92.—An Act to permit, until the Thirty first day of August, One thousand eight hundred and forty-five, Wheat to be delivered from the Warehouse or the Vessel Duty free, upon the previous Substitution of an equivalent Quantity of Flour or Biscuit in the Warehouse. [10th August, 1842.]

CAP. 93.—An Act to amend an Act of the Fourth Year of Her present Majesty, to discontinue the Excise survey on Tobacco, and to provide other Regulations in lieu thereof. [10th August, 1842.]

CAP. 94.—An Act to consolidate and amend the Laws relating to the Services of the Ordnance Department, and the Vesting and Purchasing of Lands and Hereditaments for those services, for the Defence and Security of the Realm.

[10th August, 1842.]

CAP. 95.—An Act for consolidating the Four Courts, Marshalsea, Dublin, Sheriff's Prison, Dublin, and City Marshalsea, Dublin, and for regulating the Four Courts Marshalsea in Ireland. [10th August, 1842.]

CAP. 96.—An Act to alter the Number and define the Boundaries of the several Baronies of the County of Dublin. [10th August, 1842.]

CAP. 97.—An Act to amend the Law relating to Double Costs, Notices of Action,

Limitations of Actions, and Pleas of the General Issue, under certain Acts of Parliament. [10th August, 1842.]

S. 1. So much of any enactment in any local and personal acts as gives double or treble costs, or any other than the usual costs between party and party, repealed; and in lieu thereof costs as between party and party to be recovered, and no more.

S. 2. So much of any enactment in any public acts not local and personal, as gives double or treble costs, or any other than the usual costs between party and party, repealed; and instead of such costs the parties shall receive such full indemnity as to their costs as shall be taxed by the proper officer.

S. 3. Repeals all provisions in local and personal acts whereby any party is entitled to plead the general issue, and give special matter in evidence.

S. 4. In all cases where notice of action is required, it shall be given one calendar month before action brought, which shall be sufficient notwithstanding any act to the contrary.

S. 5. After the passing of this act, the period within which any action may be brought for any thing done under the authority or in pursuance of any local and personal act, shall be two years, or in case of continuing damage one year after it has ceased; and all other periods of limitation are repealed.

S. 6. Act not to extend to any legal proceeding commenced before its passing. CAP. 98.—An Act to amend the Laws concerning Prisons. [10th August, 1842.]

S. 1. The title to lands, &c. taken in trust for the purposes of a prison, court-house, &c. to become absolutely vested in the parties to whom the conveyance is made, after five years from the passing of this act as to lands already purchased, and after five years from the date of the conveyance as to lands purchased afterwards; and in case of proceedings in the meantime on which judgment shall be obtained for the recovery of the possession of any such lands, &c. there shall be paid to the plaintiff, instead of the lands, his costs and the value of the lands as found by a jury.

S. 2. The value to be found by the jury which shall try the proceedings for the recovery of possession, and to be certified by the judge.

S. 3. The council of any borough having a court of sessions of the peace empowered to borrow money for building, repairing, or enlarging prisons, court-houses, &c.: the whole to be repaid within thirty years.

S. 4. Empowers the exchequer loan commissioness to make advances for such purposes, to be repaid within twenty years.

S. 5. Power to the corporations to grant bonds or mortgages of lands, the rents of which are applicable towards the creation or maintenance of their prisons, or to make gaol rates, for securing repayment of such advances.

S. 6. Gaol rate to be made and raised in the same manner as the borough rate.

S. 7. Mode of assessment of rates on parts of parishes, &c. partly within and partly without the borough.

S. 8. Corporations and others empowered to sell and convey lands for the purposes of this act.

S. 9. Repeal of so much of 4 Geo. 4, c. 69, as restricts the power to borrow money for building, &c. gaols or houses of correction, as to the amount of the advance and period of repayment.

S. 10. Extends the period for repayment, of loans in counties to thirty years or in case of loans by the exchequer loan commissioners, to twenty years.

S. 11. In case of express presentment that one gaol is insufficient for a county,

&c. the justices may provide and maintain two or more, and for that purpose have the same powers which they have as to one; and prisoners committed to the common gaol may be kept in such additional gaols, and shall be there in the custody of the sheriff, who shall appoint and remove the keepers.

S. 12. Amends the Parkhurst Prison Act, 1 & 2 Vict. c. 82, and gives power to take, under orders in councils, additional buildings and land for the purposes of the prison.

S. 13. Justices of counties and corporations may purchase and hold so much land as the secretary of state shall deem necessary for the purposes of a prison.

S. 14. Gives to justices in counties and councils of boroughs the same powers of contracting with committees of district prisons established under the 5 & 6 Vict. c. 53, [ante, p. 486] for the conveyance and maintenance of prisoners therein, which they have for contracting for the like purposes with the county justices or councils of boroughs, although they be not parties to the agreement under which the district prison was established; and offenders so committed may equally be tried by the district court.

S. 15. In every borough having a separate court of sessions, there shall be one common gaol and at least one house of correction, except in cases where contracts are made for district prisons.

S. 16. Repeal of the provisions of the 1 Geo. 2, c. 20, as to the Canterbury house of correction.

S. 17. Repeal of any enactments authorizing the making of agreements as to district prisons, at quarterly meetings of the councils; and such agreements may hereafter be made at a special meeting called for that purpose.

S. 18. Where no special contract exists, the expenses of borough prisoners confined in county prisons to be paid by the borough.

S. 19. Expenses in the prosecution of such prisoners at the county sessions to be defrayed by the treasurer of the borough, as under the 5 & 6 Will. 4, c. 76, s. 113.

S. 20. Expenses of conveyance, maintenance, and custody of such prisoners to be paid out of rate to be levied by the council, in the nature of a borough rate; the amount to be settled by a barrister appointed by the visiting justices and the council, in case of dispute, or in default of his appointment in fourteen days, by the arbitration of a barrister named as provided by the 5 Geo. 4, c. 85.

S. 21. Accounts of such expenses to be rendered by the clerk to the visiting justices, to the town-clerk of the borough, and to be conclusive against the borough unless objected to in a month.

S. 22. Such boroughs to be freed from contributing to the county rate in respect of the conveyance, &c. of such prisoners.

S. 23. The invalidity of any grant of sessions of the peace to a borough not to alter its liability, until the sessions at which another county rate is made.

S. 24. This act not to affect any question as to the validity of any charter of incorporation or grant of quarter sessions; and every rate made and proceeding had under this act to be valid, whether such charter or grant be valid or invalid.

S. 25. Summary punishments for assaults on prison officers.

S. 26. Provisions for examination of convicts previous to their reception at Millbank Penitentiary.

S. 27. Provisions for custody of admiralty prisoners under sentence of court-martial.

S. 28. Powers to the admiralty to change the place of confinement of admiralty prisoners.

S. 29. Provisions as to the subsistence of admiralty prisoners

S. 30. Provisions for superannuation allowances to officers of prisons.

S. 31. In case any debtor in execution shall hereafter escape out of custody, the sheriff, &c. shall only be liable to an action on the case for damages at the suit of the detaining creditor, and not to any actions of debt; after 1st March, 1843, no poundage shall be payable to sheriffs, &c. for taking any person in execution, but only such fees as shall be allowed by the judges pursuant to the 1 Vict. c. 55.

S. 32. Interpretation clause.

S. 33. Act not to extend to Scotland or Ireland.

S. 34. Act may be amended or repealed this session.

CAP. 99.—An Act to prohibit the Employment of Women and Girls in Mines and Collieries, to regulate the Employment of Boys, and to make other Provisions relating to Persons working therein. [10th August, 1842.]

S. 1. From the passing of this act, no female to be employed in any mine or colliery, other than such as were before employed therein; from three months afterwards no female under eighteen years of age to be employed in any mine or colliery; and existing indentures of apprenticeship of females under eighteen to be thenceforth void; and after the 1st March, 1843, no female to be so employed, and all indentures of apprenticeship of females to become void.

S. 2. After 1st March, 1843, no male under ten years to be employed in any mine or colliery, except such as at the passing of this act were nine years old, and had before been employed therein.

S. 3. Provision for inspector of mines and collieries, who shall report his proceedings as directed by the secretary of state, and whether the provisions of this act are properly observed.

S. 4. No person henceforth to take an apprentice to work in a mine or colliery, who is under ten years of age, nor for a longer period than eight years; indentures contrary to this act to be void, and those now in force to be void when the apprentice attains the age of eighteen.

S. 5. Penalty of not more than 10*l.*, or less than 5*l.*, for every person employed in a mine or colliery contrary to these provisions.

S. 6. Penalty of 8*l.* on parents or guardians misrepresenting the age of any person employed in a mine or colliery.

S. 7. Nothing herein to prevent the employment of persons in or about a mine or colliery if carried on above ground.

S. 8, 9. Where there are entrances or communications by vertical or other shafts, no steam or other engine to be under the charge of a person under the age of fifteen; and in case of a windlass or gin worked by a horse or other animal, the person on the bank under whose direction the driver acts shall be taken to be the person having the charge of it.

S. 10, 11, 12. Proprietors of mines and collieries, &c., prohibited from paying wages at public houses; wages so paid to be recoverable as if no payment had been made; penalty of 10*l.*, and not less than 5*l.*, for breach of this enactment.

S. 13. Agents, servants, or workmen, or contractors, may be summoned for acts done by them contrary to this act, without the consent of the owner of the colliery.

S. 14. Definition of the terms "owner," "agent," and "servant."

S. 15. Summonses, &c., need only set forth the names of the ostensible proprietors of the mine, or the title of the firm, in cases of partnership.

S. 16. Service of summonses or warrants at the office or counting-house to be good service on the owner of the mine; all complaints to be preferred within three months.

S. 17. Provision for recovery and application of penalties.

S. 18. Power of imprisonment for two months in default of payment of penalty, and no sufficient distress.

S. 19. Inhabitants of parishes not to be incompetent as witnesses.

S. 20. Distress not to be unlawful for want of form, &c.

S. 21. Power of appeal to quarter sessions.

— S. 22. Convictions not removable by certiorari; commitments not to be void for defect therein, if founded on a valid conviction.

S. 23. Act may be amended or repealed this session.

CAP. 100.—An Act to consolidate and amend the Laws relating to the Copyright of Designs for ornamenting Articles of Manufacture. [10th August, 1842.]

S. 1. Act to commence 1st September, 1842, and thereupon the several acts in the Schedules (A.) and (B.) to be repealed. [These are the 27 Geo. 3, c. 38; 29 Geo. 3, c. 19; 34 Geo. 3, c. 23; 2 Vict. cc. 13 and 17.]

S. 2. Saving of existing copyrights.

S. 3. As to new designs (except for sculpture and other things within the provisions of the 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56, the proprietor shall have the sole right to apply them to articles of manufacture, &c., for the terms thereafter respectively mentioned, to be computed from the time of registration under this act.

S. 4. No person to be entitled to the benefit of this act, unless his design have before publication been registered according to this act, and in the manner and subject to the regulation, and with the marks herein specified.

S. 5. Explanation of the term "proprietor," as used in this act.

S. 6. Mode of transfer of copyright, and registering thereof; forms of transfer, &c.

S. 7. Provisions against the piratical use or sale of registered designs.

S. 8. Penalty on such piracy, of not less than 5*l.*, and not exceeding 30*l.*, to the proprietor of the design, to be recovered by action of debt or summary proceeding before justices; provisions for form of proceedings, recovery of penalties by distress, &c., &c.

S. 9. Proviso as to action for damages, if the proprietor think fit.

S. 10. Power, in certain cases, for the cancellation or amendment of the registration.

S. 11. Penalty of 5*l.* for wrongfully using marks denoting a registered design.

S. 12. Limitation of actions to twelve months.

S. 13. Power to justices to order payment of costs in case of summary proceedings.

S. 14. Board of Trade to appoint a registrar, deputy registrar, &c., of designs for ornamenting articles of manufacture.

S. 15. Duties of the registrar, and conditions of registration.

S. 16. Certificate of registration of design to be made by registrar on the copy or drawing returned to the proprietor; such certificate to be evidence per se.

S. 17. Right of inspection of registered designs.

- S. 18. Application of fees of registration.
- S. 19. Penalty on registrar or other officers for extortion.
- S. 20. Interpretation clause.
- S. 21. Act may be amended or repealed this session.

CAP. 101.—An Act for extending to the Governors and Officers of the East India Company the powers given by an Act of the Fifth Year of King George the Fourth to Her Majesty's Governors and Officers for the more effectual Suppression of the Importation of Slaves into India by Sea. [10th August, 1842.]

CAP. 102.—An Act for the better Discovery and Prevention of Bribery and Treating at the Election of Members of Parliament. [10th August, 1842.]

S. 1. If after the nomination of a committee on an election petition charging bribery, the petition, or any charge of bribery, whether in support of or in answer to the petition, shall be withdrawn or not *bonâ fide* prosecuted, the committee may examine into and ascertain the circumstances of such withdrawal, &c., and whether it be matter of compromise in order to avoid the discovery of bribery at the election, and report specially thereon; power to examine the sitting members and candidates, their agents, &c.

S. 2. If the committee in their report recommend further inquiry, the speaker shall nominate an agent to prosecute the investigation, and the committee shall within fourteen days re-assemble for that purpose.

S. 3. The committee so re-assembled to possess all the powers of the election committee.

S. 4. Any petition by an elector alleging general bribery at the previous election, presented after the time limited for presenting election petitions, and within three months after some one of the acts of bribery charged, &c., shall be inquired into by a committee to be appointed in all respects as an election committee; and for that purpose to be referred to the general committee, &c., &c.; like power as to costs.

S. 5. Committee not to proceed upon any case of bribery not proved to have been committed within three months before the presenting of the petition.

S. 6. If an election petition charging bribery be withdrawn before the committee is appointed, any petition complaining of general bribery presented within twenty-one days after such withdrawal is testified to the house, shall, notwithstanding the lapse of three months after an act of bribery, be dealt with in the same manner as in case of a petition presented under s. 4.

S. 7. Petitioners to enter into recognizances.

Ss. 8, 9, 10, 11, 12, contain like provisions as to the forfeiture, form of, and proceedings on the recognizances, as in the case of recognizances on election petitions.

S. 13. Committees reassembling or appointed under this Act, not to have the power to affect the seat or return, or the issuing or withholding the writ of election.

S. 14. Provisions for defraying expenses of the prosecution of inquiries by an agent under this Act.

S. 15. Power to committee to order by whom and in what proportions the costs of the inquiry shall be paid.

Ss. 16—19. Provisions for ascertainment, recovery, and apportionment of costs.

S. 20. Payment or gift of money, &c. to or for any voter before, during, or after any election, or to any relation of a voter, on account of his having voted or refrained from voting, or being about to do so, whether given under the name of

head-money or any other name, and whether in compliance with any usage or not, shall be deemed bribery.

S. 21. Act to apply to elections subsequent to 1st June, 1842.

S. 22. Candidates or members *treating* before, during, or after the election, for the purpose of influencing votes, or rewarding any person for having given or withheld his vote, shall be incapable of sitting for that place in the same parliament.

S. 23. Act may be amended or repealed this session.

CAP. 103.—An Act for abolishing certain Offices of the High Court of Chancery in England. [10th August, 1842.]

S. 1. From 28th October, 1842, the offices of clerks of enrolments and their deputies; comptrollers of the hanaper; six clerks, sworn clerks, and waiting clerks, (except as to the recovery of by-gone fees, and to the right of practising as solicitor or attorney,) abolished.

S. 2. Provision for transfer of enrolments, records, &c. to such custody as the Master of the Rolls shall direct.

S. 3. Duties and salaries of clerks in the petty bag, in relation to causes in the petty bag; of the "clerk of enrolments;" of the "clerks of records and writs;" and "taxing masters," &c.: to hold their offices during good behaviour, and discharge their duties in person: general provision as to the business to be performed by these officers.

S. 4. Nomination of new officers: provision for filling up vacancies, &c.

S. 5. Power to Lord Chancellor to appoint additional clerks of records and writs, and taxing masters: but the number of the clerks not to exceed six, out of the taxing master's nine.

S. 6. Power of appointment of deputies in case of necessary absence, subject to Lord Chancellor's approval.

Ss. 7, 8. Power to the above officers, and the clerk of affidavits, to administer oaths and take affirmations: persons swearing or affirming before them to be subject to penalties for perjury as before the Court of Chancery, or any of the Masters.

S. 19. Power to the above officers respectively to appoint clerks, and remove them, and fill up vacancies.

S. 20. Prohibits officers and clerks from taking gratuities.

S. 21. Persons employed under this Act not to practise as barristers, or solicitors or attorneys; solicitors, &c. accepting office, to be struck off the roll.

Ss. 12—18. Compensation clause.

S. 19. Provisions for retiring allowances.

S. 20. Payment of salaries, compensations, &c. to be made quarterly, out of the suitors' fund.

S. 21. Fees to continue, and to be paid to the suitors' fund.

S. 22. Power to Lord Chancellor, for the purpose of keeping up the fee fund, to impose fees on proceedings and business in the Court of Chancery and its officers.

S. 23. Provision in case of surplus or deficiency of the fee fund.

S. 24. Priority of compensations over all other charges under this Act; power to the Lord Chancellor to purchase compensations and retiring allowances.

Ss. 25—27. Power to invest and call in the surplus interest of the fee fund.

S. 28. Provision as to the appointment of messengers and servants.

S. 29. The ground and buildings of the six clerks' and enrolment offices

vested in the Accountant-General for the purposes of this Act; dividends of "money arising by sale of the six-clerks' office," to become part of the suitors' fee fund.

S. 30. Provision for defraying the expenses of the offices of persons employed under this Act, &c.

Ss. 31, 32. Power to Lord Chancellor to make orders for carrying this Act into execution, and to vary such orders.

S. 33. Provision for defraying expenses of preparing and passing this Act.

S. 34. Provision for continuance of the office of clerk of enrolments in the Court of Chancery for the county of Middlesex.

S. 35. Power to Lord Chancellor, by order issued before 28th October, 1842, to postpone the commencement of this Act for six months.

S. 36. Act not to affect the general powers of the Lord Chancellor.

S. 37. Interpretation clause.

S. 38. Act may be amended or repealed this session.

CAP. 104.—An Act to explain and amend certain Enactments contained respectively in the Acts for the Regulations of Municipal Corporations in England and Wales, and in Ireland. [10th August, 1842.]

S. 1. After the passing of this Act, the word "contract," in the 5 & 6 Will. 4, c. 76, and 3 & 4 Vict. c. 108, shall not extend to any lease, sale, or purchase of lands, or any agreement for such lease, &c. or for the loan of money, or to any security for the payment of money only.

S. 2. Members of the council not to vote or take part in the discussion of any matter in which they have by themselves or their partner any pecuniary interest.

S. 3. Persons against whom suits have been commenced for penalties incurred under the above enactments, by reason of any construction of the word "contract," different from what is herein enacted, may apply to a court or judge to have the same discontinued, on payment of costs out of pocket up to that time.

Ss. 4, 5. Judges empowered to order suits commenced on or before the 8th February, 1842, to be discontinued on payment of costs; and of suits commenced after that day, without payment of costs.

S. 6. This Act not to extend to any actions in which judgment has passed.

S. 7. Councillors, &c. not henceforth to be disqualified by reason of their interest in any lease, sale, or purchase of lands, or agreement for such lease, &c. or for the loan of money, or in any security for the payment of money only; and all elections of such persons declared to be and to have been valid, except in cases where judgment had been obtained before this Act.

S. 8. Office of sheriff not henceforth to be deemed an office of profit, so as to create any disqualification.

S. 9. Act may be amended or repealed this session.

CAP. 105.—An Act to amend an Act of the First and Second Years of His late Majesty King William the Fourth, to empower Landed Proprietors in Ireland to sink, embank, and remove obstructions in Rivers. [10th August, 1842.]

CAP. 106.—An Act to regulate the Irish Fisheries. [10th August, 1842.]

CAP. 107.—An Act for regulating the Carriage of Passengers in Merchant vessels. [10th August, 1842.]

CAP. 108.—An Act for enabling Ecclesiastical Corporations, aggregate and sole, to grant Leases for long Term of Years. [12th August, 1842.]

CAP. 109.—An Act for the Appointment and Payment of Parish Constables.

[12th August, 1842.]

S. 1. After 80 and before 100 days next after the passing of this act, and on some day after 24th March and before 9th April in each following year, the justices of every county shall hold a special petty session in their several divisions for the appointment of parochial constables.

S. 2. Justices to issue precepts to overseers requiring them to make out and return, within eighty days after the passing of this act, and before the 24th of March in each following year, lists of a competent number of men qualified to serve as constables.

S. 3. Overseers thereupon to summon a vestry, which shall make out a list of the number named in the precept.

S. 4. Small parishes, and extra-parochial places, may for the purposes of this act be annexed, by order of the justices at a special session, to any adjoining parish.

S. 5. Ablebodied men resident within the parish, between the ages of twenty-five and fifty-five, rated to the poor or county rate on tenements of the net yearly value of 4*l.*, to be qualified to serve as constables.

S. 6. Exemptions from serving as constables.

S. 7. Disqualifications from serving, viz., licensed victuallers and dealers in exciseable liquors or beer, and persons attainted of treason or felony, or convicted of any infamous crime.

S. 8. Overseers to make copies of lists and fix them on the church and chapel doors on the three Sundays in March, and also to keep the original list or a copy for inspection by parishioners during those three weeks.

S. 9. Penalty of 5*l.* on overseers for neglecting returns or making false returns.

S. 10. Overseers to attend the special session held for the appointment of constables, and verify their lists and answer questions on oath: and lists to be then corrected, and allowed and required by the justices.

S. 11. Justices to choose from the allowed list the names of such number as they deem necessary to act as constables within the parish for the year following: persons not to be chosen to serve a second time until all the others liable and qualified have also served.

S. 12. Constables to be sworn: form of oath: proviso for allowances of substitutes approved by the justices.

S. 13. Penalty of 10*l.* on refusing to serve or find a substitute; and of 5*l.* on refusing to act when sworn.

S. 14. Lists of constables appointed in the division to be published; and parish lists to be affixed to the church doors by the overseers.

S. 15. Constables to have within the whole county the powers, &c. of a constable within his constablewick, but not to be bound to act as a constable out of his parish without special warrant: and to be subject to the authority of any chief constable or superintendent appointed under 2 & 3 Vict. c. 93.

S. 16. Provisions for supply of vacancies on death, disqualification, or refusal to serve.

S. 17. Justices to settle tables of fees and allowances to justices' clerks for performance of their duties under this act, and to the constables for such duties as the justices think fees ought to have been allowed for; to be paid (where not payable by law out of the county rate) out of the poor rate.

S. 18. The vestry may resolve to have one or more paid constables for their parish.

S. 19. Justices, on receipt of such resolution, to appoint such paid constables : and in parishes where they are appointed, none other need be ; such appointments to be held till resignation, dismissal for misconduct by the justices, or rescission of the resolution by the vestry.

S. 20. Salary of paid constables to be paid out of the poor rate.

S. 21. After the passing of this act, no constable, &c. to be appointed at any court leet or torn, or otherwise than under this act or the 2 & 3 Vict. c. 93 ; but this act not to apply to any special constables, or the city of London or metropolitan police district, or to any borough within the municipal corporation acts, or any parish, &c. in which rates are levied under the 3 & 4 Will. 4, c. 90, or any local act, for payment of constables.

S. 22. Justices may order lock-up houses and strong rooms for temporary confinement before committal for trial.

S. 23. Superintending constables to be appointed to have the charge thereof.

Ss. 24, 25. Recovery and application of penalties.

S. 26. Interpretation clause.

S. 27. Act may be amended or repealed this session.

CAP. 110.—An Act to annex the County of the City of Coventry to Warwickshire, and to define the Boundary of the City of Coventry. [12th August, 1842.]

CAP. 111.—An Act to confirm the Incorporation of certain Boroughs, and to Indemnify such persons as have sustained Loss thereby. [12th August, 1842.]

S. 1. The several charters of incorporation, and all grants of separate courts of sessions of the peace, granted to any boroughs in pursuance of the 5 & 6 Will. 4, c. 76, or subsequent acts, and all acts and proceedings done in pursuance thereof, shall be deemed good and lawful from the time of such grants, acts and proceedings.

S. 2. Provides for compensation to officers deprived of their offices or any of their emoluments in consequence of any such grant.

S. 3. Act may be amended or repealed this session.

CAP. 112.—An Act for suspending, until the First Day of October One thousand eight hundred and forty-three, Appointments to certain Ecclesiastical Preferments in the Diocese of St. Asaph and Bangor ; and for securing certain Property to the said Sees. [12th August, 1842.]

S. 1. The 5 & 6 Will. 4, c. 30, and 6 & 7 Will. 4, c. 67, so far as they apply to the dioceses of St. Asaph and Bangor, continued to 1st October, 1843.

S. 2. All lands, tithes, endowments, &c. held or received by the present bishops of St. Asaph and Bangor as such, shall be deemed part and parcel of the lands, &c. of those sees, and shall continue to be held and received by the bishops for the time being ; subject to any order in council issued under the 6 & 7 Will. 4, c. 77.

S. 3. Act may be amended or repealed this session.

CAP. 113.—An Act for Confirmation of certain Marriages in Ireland.

[12th August, 1842.]

S. 1. All marriages heretofore celebrated in Ireland by presbyterian or other protestant dissenting ministers or teachers, or those who then had been such, to be of the same force as if solemnized by clergymen of the Established Church.

S. 2. Act not to extend to any marriage already declared invalid by any court of competent jurisdiction, nor any marriage where either of the parties shall afterwards, during the lifetime of the other, have lawfully intermarried with any other person, nor any marriage respecting which any criminal prosecution is now depending.

S. 3. Act not to affect any act already done under the authority of any court, or in the administration of any personal estate, execution of any will, or performance of any trust.

S. 4. Act may be amended or repealed this session.

CAP. 114.—An Act to repeal so much of an Act of the Second and Third Years of Her present Majesty, for the Suppression of the Slave Trade, as relates to Portuguese Vessels. [12th August, 1842.]

CAP. 115.—An Act for raising the Sum of Nine millions one hundred and ninety-three thousand pounds by Exchequer Bills, for the Service of the Year One thousand eight hundred and forty-two. [12th August, 1842.]

CAP. 116.—An Act for the Relief of Insolvent Debtors. [12th August, 1842.]

S. 1. Any person not being a trader, or being a trader whose debts are less than 300*l.*, on giving and publishing the notice required by this act, may present a petition for protection from process, to the Court of Bankruptcy, with a schedule of debts owing by and to him, &c., and thereupon the judge or commissioner of the Court of Bankruptcy may grant him a protection from process against his person or property until his appearance in Court: and on the presentation of his petition his estate and effects shall forthwith become vested in the official assignee appointed by the commissioners.

S. 2. Nothing herein contained to prevent the insolvent from being arrested under a judge's order.

S. 3. Provision for rotation of commissioners and making orders in relation to the hearing, &c. of such petitions.

S. 4. Commissioner to examine the petitioner and his witnesses on oath: power to adjoin examination and summon witnesses: and if the commissioner be satisfied of the truth of the allegations in the petition and schedules, and that the debts were not contracted fraudulently, &c., and that he has made a full discovery and surrender of his estate, he may make a final order for his protection from process, and for the vesting of his estate in an official and a creditor's assignee: proviso for allowance for the support of the petitioner.

S. 5. Power from time to time to renew the order for protection, until the final order.

S. 6. Power to commit any petitioner prevaricating or making a false statement to prison for a month: as to other persons, the commissioner to have the same power of commitment as under the bankrupt laws.

S. 7. On the passing of the final order, the estate, present and future, real and personal, effects and credits, of the petitioner, to become absolutely vested in his assignees without conveyance, as if under a fiat: provision in case of death or removal of assignees.

S. 8. Certificate of appointment of assignees to be registered in the Court of Bankruptcy, in cases where by law the conveyance of the petitioner's estate would require registration: and the title of purchasers not to be invalidated by the appointment of an assignee, unless, as to Great Britain and Ireland, the certificate be registered in two months from the appointment, and as to all other places, in twelve months.

S. 9. Assignees entitled to claim after-acquired estate or effects of the petitioner, which shall be absolutely vested in them on their serving and filing a copy of the claim: but no assignee to take possession of such estate without an order of the commissioner or Court of Review.

S. 10. The presentation of the petition and the making of the final order, to be

a good plea in bar to any suit or action for a debt contracted before the date of filing the petition; of which the production of the order, signed by the commissioner, with proof of his handwriting, shall be evidence.

S. 11. Like evidence of appointment of assignees to be received as under the bankrupt laws.

S. 12. Power to creditor or official assignee to apply by motion, after one month's notice to the petitioner, for the rescinding of the final order in whole or in part: commissioner to hear such motion, and if he think fit, to make such rescinding order, if he sees reason to believe that the petitioner has not made a full disclosure of his estate, or has not given notice to the assignees of after-acquired property: proviso for a month's notice to the assignees in case of application by a creditor, and notice in the Gazette: power to commissioners, on refusing to make the order, to direct the petitioner's costs to be paid by the creditor or assignee, but not out of the estate.

S. 13. Power to judges and commissioners of the Court of Bankruptcy to make orders for carrying this act into execution, to be approved by the lord chancellor, and laid before Parliament.

S. 14. Act not to come into operation before 1st November, 1842, except as to the power to make orders under s. 13.

S. 15. Act may be altered or repealed this session.

CAP. 117.—An Act to amend and continue, until the First Day of October, One thousand eight hundred and forty-two, the Acts for regulating the Police of Manchester, Birmingham and Bolton.
[12th August, 1842.]

CAP. 118.—An Act for guaranteeing the Payment of the Interest on a Loan of One million five hundred thousand Pounds, to be raised by the Province of Canada.
[12th August, 1842.]

CAP. 119.—An Act to enable her Majesty to grant Furlough Allowances to the Bishops of Calcutta, Madras and Bombay, who shall return to England for a limited Period after residing in India a sufficient Time to entitle them to the highest Scale of Pension.
[12th August, 1842.]

CAP. 120.—An Act for amending the Constitution of the Government of Newfoundland.
[12th August, 1842.]

CAP. 121.—An Act to apply a Sum out of the Consolidated Fund, and certain other Sums, to the Service of the year One thousand eight hundred and forty-two, and to appropriate the Supplies granted in this Session of Parliament.
[12th August, 1842.]

CAP. 122.—An Act for the Amendment of the Law of Bankruptcy.
[12th August, 1842.]

S. 1. Act to commence 11th November, 1842.

S. 2. Repeal of all laws, statutes and usages at variance with this act.

S. 3. The lord chancellor may dispense with the bond now required to be given by the petitioning creditor.

S. 4. Fiats in bankruptcy hereafter to be transmitted direct to the Court, and to be forthwith opened, unless postponed by the Court: provided that in case the fiat be not opened by the petitioning creditor within three days, the Court may open it within fourteen days on the application of any other creditor of equal amount; and no fiat to be issued to the petitioning creditor or his attorney.

S. 5. When a fiat is issued against any person, and it is proved to the satisfaction of the Court that he is about to quit England, or to remove or conceal his

goods to defraud his creditors, the Court may issue a warrant to arrest him and seize his papers, &c.

S. 6. Any person so arrested may apply for an order on the petitioning creditor to show cause why he should not be discharged, and the Court may make absolute or discharge such order, and direct the costs to be paid by either party; and such order may be discharged or varied on application to the Court of Review.

S. 7. No person shall be liable to be made bankrupt on an act of bankruptcy committed more than twelve months before the fiat.

S. 8. No fiat to be invalid by reason of concerted act of bankruptcy, except in cases where petitions for a supersedeas are now pending.

S. 9. The amount of a petitioning creditor's debt hereafter to be as follows:—the single debt of a creditor, or of two or more partners, 50*l.*; the debt of two creditors, 70*l.*; and of three or more, 100*l.*; and creditors who have given credit on valuable consideration for a sum not yet payable may join in the petition.

S. 10. Livery-stable keepers, coach proprietors, carriers, ship owners, auctioneers, apothecaries, market gardeners, cow keepers, brick makers, alum makers, limeburners, and millers, to be deemed traders subject to the bankrupt laws.

S. 11. On a creditor of any trader making affidavit of his debt, and of the delivery of an account requiring payment, the Court may summon the trader to appear.

S. 12. Mode of proceeding on such summons.

S. 13. Trader not attending summons, or refusing to admit the demand, and not making a deposition of his belief of a good defence to the demand, and not paying, securing or compounding the debt within fourteen days, to be deemed to have committed an act of bankruptcy on the fifteenth day after service of the summons, provided a fiat issue within two months after the filing of the affidavit.

S. 14. Trader signing an admission of such demand, and not paying, &c. within fourteen days, to be deemed to have committed an act of bankruptcy on the fifteenth day after the filing of such admission, provided a fiat issue within two months after the filing of the affidavit.

S. 15. A trader signing an admission of part of such demand, and not making a deposition of a good defence to the residue, and not paying, &c. the sum so admitted, and as to the residue, not paying or giving surety for any sum recovered and costs, within fourteen days, shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of the summons, provided a fiat issue within two months after the filing of the affidavit.

S. 16. Refusal to sign the admission shall be deemed a refusal to admit the demand: provided that the Court may, on reasonable cause shown, enlarge the time for the admission, &c.

S. 17. An admission of debt signed elsewhere than in court, and attested by an attorney attending on behalf of the trader, may be filed, and shall have the same force as if signed by the trader on his appearance under such summons.

S. 18. Trader so summoned to appear may have such costs as the Court shall think fit.

S. 19. In any action brought by a creditor against a trader after this act, if the plaintiff shall not recover the amount sworn to in his affidavit of debt, the defendant shall be entitled to costs, if it appear that the affidavit was made for such amount without probable cause.

S. 20. If a plaintiff shall recover judgment for any debt or money demand against a trader, and be in a situation to sue out execution on the judgment,

there being no set-off, and the trader shall not within fourteen days after notice requiring payment, pay, secure or compound for the judgment debt, he shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of such notice: provided, that if the execution be restrained by order of any court, no further proceeding shall be had on such notice, but the plaintiff, when he is again in a situation to sue out execution, may proceed again by notice in like manner.

S. 21. Trader disobeying the order of a court of equity, or order in bankruptcy or lunacy, for payment of money, after service of an order for payment on a peremptory day fixed thereby, and being personally served with such order fourteen days before the day appointed for payment, shall be deemed to have committed an act of bankruptcy on the fifteenth day after service of the order.

S. 22. Trader filing a declaration of insolvency in the office of the secretary of bankrupts, shall be deemed to have committed an act of bankruptcy at the time of filing, provided a fiat issue within two months: a copy of such declaration, purporting to be certified by the secretary or his clerk, to be evidence of its having been filed.

S. 23. Any person adjudged bankrupt shall have notice thereof before the adjudication be advertised in the Gazette, and to be allowed five days to show cause against the adjudication; and if on cause shown the Court deem the petitioning creditor's debt, trading, or act of bankruptcy, insufficient to support the adjudication, it shall be annulled; but if no cause be shown to the satisfaction of the Court, the notice of adjudication to be advertised, and two sittings appointed for the bankrupt to surrender; the last to be on a day not less than thirty and not exceeding sixty days from the advertisement: but with consent of the bankrupt, the adjudication may be advertised sooner: and the bankrupt to be free from arrest in coming to surrender, and during the time limited for the surrender, and the time allowed him for final examination, and such other time till the certificate, as the Court by indorsement on the summons shall appoint: power to the Court to adjourn the last examination sine die, and in such case the bankrupt to be free from arrest for such time not exceeding three months as the Court shall so appoint.

S. 24. If the bankrupt shall not within twenty-one days after the advertisement in the Gazette (or if he were out of the United Kingdom, in any other part of Europe, within three months, or if elsewhere, within twelve months) proceed to dispute the fiat, and prosecute with effect, the Gazette containing such advertisement shall be conclusive evidence of the bankruptcy as against him, and all persons whom he might have sued had he not been adjudged bankrupt; saving present rights for which proceedings are pending.

S. 25. Deposition of deceased witness under a fiat, purporting to be sealed with the seal of the Court of Bankruptcy, or any copy thereof purporting to be so sealed, shall be evidence of the matters therein contained.

S. 26. Provision for a debtor to the bankrupt's estate paying the debt into Court, when sued by the assignees within the time allowed for the bankrupt to dispute the fiat.

S. 27. Audits and dividends to be had and made whenever the Court shall think fit after the time appointed for the last examination.

S. 28. Power to the Court to order three months' wages or salary to servants or clerks of the bankrupt out of the estate.

S. 29. Power to order wages not exceeding 40s. to any labourer or workman of the bankrupt, out of the estate.

S. 30. Power to grant search warrants where there is reason to believe that property of a bankrupt is concealed in any house, &c.

S. 31. If a member of a firm become bankrupt, the Court may authorize the assignee to commence actions and suits in his name and that of the remaining partner against debtors of the partnership, and releases given by the partner shall be void: the partner to have notice of and to be at liberty to show cause against the proceeding; and if he claim no benefit, to be indemnified against the costs; and the Court may direct that he have part of the proceeds of the suit.

S. 32. Bankrupt not surrendering and submitting to be examined before three o'clock on the day limited for his surrender; or not making discovery of his estate and effects; or not delivering up his estate, books, &c.; or removing, concealing, or embezzling any part of his estate to the value of 10*l.*, with intent to defraud his creditors, shall be guilty of felony, and liable on conviction to be transported for life, or not less than seven years, or imprisoned with or without hard labour for a term not exceeding two years.

S. 33. Power to the Court to enlarge the time limited for the surrender, by order made six days before.

S. 34. Bankrupt destroying, altering, mutilating, or falsifying any of his books, &c., in contemplation of bankruptcy, or making or being privy to any fraudulent entry with intent to defeat his creditors, shall be guilty of a misdemeanour, and liable on conviction to be imprisoned for a term not exceeding three years.

S. 35. Any bankrupt who within three months next before his bankruptcy, under the false pretence of carrying on business in the ordinary course of trade, shall have obtained goods on credit with intent to defraud, or have removed, concealed, or disposed of any goods so obtained, shall be guilty of a misdemeanour, and liable on conviction to be imprisoned for a term not exceeding two years.

S. 36. Power to the Court, acting in the prosecution of the fiat, to direct prosecutions against a bankrupt for any offence against this act (on the request of three creditors at least who have proved debts to the amount of 50*l.*), to be carried on by the assignees, and if they refuse, by the official assignee or such creditors.

S. 37. Bankrupt who has duly conformed shall be discharged from all debts and demands proveable under the fiat, on obtaining a certificate of conformity in manner hereinafter prescribed; but no such certificate shall release or discharge a partner of or person jointly bound with the bankrupt; and nothing herein to affect certificates heretofore allowed.

S. 38. Bankrupt not to be entitled to his certificate if he have lost by gaming or wagering in one day 20*l.*, or within a year before his bankruptcy 200*l.*, or within the same time 200*l.* by stockjobbing; or if he shall, in contemplation of bankruptcy, or after an act of bankruptcy, have concealed, destroyed, or falsified his books, &c., or made fraudulent entries, or concealed any part of his property; or if, any person having proved a false debt with his privy, he have not disclosed it to his assignees within a month.

S. 39. Mode of allowing certificate of conformity: certificate not to be discharged unless the Court certify to the Court of Review that the bankrupt has made a full conformity, and he make affidavit that the certificate was obtained without fraud, and the Court of Review afterwards confirm it.

S. 40. All contracts or securities by a bankrupt to induce any creditor to forbear opposing the certificate, void, and the money thereby received not to be recoverable : creditor to plead general issue, and give this act and the special matter in evidence.

S. 41. Penalty of treble value on creditor obtaining money, goods, &c., as an inducement to forbear opposition.

S. 42. Any bankrupt who shall, after confirmation of certificate, be arrested or sued for any debt or demand proveable under the fiat, may plead generally that the matter accrued before his bankruptcy, and may give this act and the special matter in evidence ; the certificate to be evidence of the trading, bankruptcy, fiat, and antecedent proceedings ; and bankrupt in execution for such debt or demand on a judgment antecedent to the certificate, may be ordered to be discharged on production of the certificate.

S. 43. Bankrupt, after confirmation of his certificate, shall not be liable to pay any debt or demand discharged by the certificate on any contract, &c. after the fiat, unless made in writing signed by the bankrupt, or an agent authorized in writing.

S. 44. Allowance to bankrupt : 5 per cent., and not exceeding 400*l.*, as soon as 10*s.* in the pound is paid ; 7½ per cent., and not exceeding 500*l.*, if 12*s.* 6*d.* ; 10 per cent., and not exceeding 600*l.*, if 15*s.* : allowance not to be payable till twelve months after date of fiat ; and if at that time the dividends be under 10*s.* in the pound, to be so much as assignees and Court shall think fit, not exceeding 3 per cent., and 300*l.*

S. 45. In joint fiats, one partner who has obtained his certificate, if a sufficient dividend have been paid on the joint estate and on his separate estate, shall be entitled to allowance, though the other partner be not.

S. 46. Fiats in bankruptcy, not directed to the Court of Bankruptcy, may be directed to some one of the Courts authorized to act in the prosecution of fiats in the country, as hereinafter provided, to be prosecuted in such Court, with all the powers, jurisdiction, and duties vested in the present Commissioners of Bankrupt, except as otherwise directed by this act.

S. 47. Fiats prosecuted in the country, and proceedings thereon, to be transmitted to the Court of Bankruptcy in London, to be filed and kept among its records.

S. 48. Provision for appointment by the Lord Chancellor of official assignees to act in bankruptcies prosecuted in the country ; their duties and liabilities defined.

S. 49. Official assignees not to interfere with the creditors' assignees in the appointment or removal of a solicitor or attorney, or in directing sales of the bankrupts' effects.

S. 50. Power to Lord Chancellor to remove official assignees, and fill up vacancies.

S. 51. Official assignees appointed under this act invested with the same powers, &c. as official assignees under the former act : provision for their remuneration.

S. 52. The power, jurisdiction, &c. of the Commissioners in fiats already issued, to be prosecuted elsewhere than in London, shall cease and determine ; and bankruptcies depending in the country to be removed into such of the Courts authorized to act in the prosecution of fiats in bankruptcy in the country as the Lord Chancellor shall think fit.

S. 53. Power to the Court to appoint official assignees to act with the existing assignees under such bankruptcies, and to whom the latter shall deliver over the effects; and the estate to vest in the official assignees jointly with the existing assignees.

S. 54. No official assignee to be personally liable for any act done by him or by his order, by reason of the petitioning creditor's debt, trading, or act of bankruptcy, being insufficient to support the adjudication.

S. 55. Debtor and creditor account to be furnished by official assignee to each creditor's assignee fourteen days before the advertising of a final dividend.

S. 56. Like sums to be paid by official assignees under fiats prosecuted in the country as under fiats prosecuted in London, and subject to the like orders and directions of the Lord Chancellor.

S. 57. Like sums to be paid on fiats moved into the Court of Bankruptcy or any of the other Courts authorized under this act, under which the choice of assignees shall have already taken place, as on commissions moved under the 1 & 2 Will. 4, c. 56, into the Court of Bankruptcy.

S. 58. Provisions for compensation to such existing Commissioners in the country as the Lords of the Treasury deem entitled thereto.

S. 59. Her Majesty may appoint additional Commissioners of the Court of Bankruptcy, not exceeding twelve, being serjeants or barristers at law of seven years' standing, to act in the prosecution of fiats in bankruptcy in the country, in such districts as her Majesty in council shall direct; but the Lord Chancellor may direct any fiat to the Court of Bankruptcy.

S. 60. Power to the crown to appoint successors on the death, resignation, or removal of such commissioners or their successors.

S. 61. Her Majesty may appoint additional deputy registrars, not exceeding twelve, to act in the country.

S. 62. Additional commissioners and deputy registrars to hold their offices during good behaviour, and to be subject to like privileges, &c. as at present.

S. 63. Accountant, registrars and deputy registrars, official assignees, messengers, and ushers of the Court of Bankruptcy, exempted from serving on juries.

S. 64. The Court of Review may henceforth be formed of one judge.

S. 65. The judges of the Court of Review to take rank next after the judges of the superior Courts.

S. 66. Lord Chancellor may direct the Court authorized to act in the prosecution of any fiat in bankruptcy to hear and make orders in any matter in bankruptcy heretofore within the jurisdiction of the Court of Review, subject to appeal to that Court; and every commissioner of the Court of Bankruptcy authorized to act in the prosecution of a fiat shall be deemed to be a Court so authorized; and all things by this act directed and authorized to be done by the Court of Bankruptcy may be done by one or more of the commissioners appointed under the 1 & 2 Will. 4, c. 56; and every Court authorized to act and acting in the prosecution of any fiat, or in execution of any duty imposed on it by law, to have the privileges of a Court of Record.

S. 67. Affidavits in bankruptcy may be sworn before the Court of Review, either of the subdivision Courts, any commissioners, the master or any registrar or deputy registrar of the Court of Bankruptcy, a master in Chancery, in Scotland or Ireland before a magistrate, or elsewhere before a magistrate and attested by a notary, or before a British minister, consul, or vice-consul.

S. 68. Courts may take evidence either *vivâ voce* or on affidavit.

S. 69. Power to award costs; to be recovered in like manner as costs awarded by a rule of the superior Courts.

S. 70. Commissioners to make general rules and orders for regulating the forms of proceedings and practice in Courts of Bankruptcy.

S. 71. The building conveyed by a feoffment recited in the stat. 1 & 2 Geo. 4, c. 115, for the transaction of business in bankruptcy in London, vested in the commissioners of the Court of Bankruptcy for the time being, appointed under the 1 & 2 Will. 4, c. 56.

S. 72. The building to be henceforth called the Court of Bankruptcy.

S. 73. Registrar of the Court of Bankruptcy to keep books in which he shall enter an abstract of all proceedings filed in the Court, in a form to be prepared by him, subject to the sanction of the commissioners, and approved by the lord chancellor.

S. 74. Office of clerk of enrolments in bankruptcy to be abolished on the next vacancy, and its duties performed by the registrar.

S. 75. Registrar to pay over fees received by him for entering fiats, &c. of record, under the 2 & 3 Will. 4, c. 114, s. 6, into the Bank of England, to "The Secretary of Bankrupts' Account."

S. 76. Salaries of judge, commissioners, and other officers of the Court of Bankruptcy, to be paid out of the fund intituled "The Secretary of Bankrupts' Account."

S. 77. Power to lord chancellor to order the payment of retiring annuities to the judge and commissioners of the Court of Bankruptcy and their successors.

S. 78. Provision for salary of accountant in bankruptcy; for appointment and payment of such additional clerks to the accountant or to the registrar, as the lord chancellor shall think fit; and for the defraying of the expenses to be incurred in providing and keeping in repair Courts, &c. &c., and generally for carrying this act into execution; the Courts provided for the purposes of this act to vest in the respective commissioners forming such Courts, and their successors; and ten shillings to be charged to the bankrupt's estate, on every sitting, for the use of the Court.

S. 79. Every warrant to be under the hand and seal of a commissioner, and every summons under his hand.

S. 80. Mode of service of summons where it appears that the party is keeping out of the way, and cannot be personally served.

S. 81. Persons wilfully giving false evidence before the Court authorized to act in the prosecution of a fiat, to be liable on conviction to the penalties of perjury.

S. 82. All sums forfeited under this act, or on any conviction for perjury, may be sued for by the assignees, and the money recovered divided among the creditors.

S. 83. Charges of auctioneers, appraisers, brokers, valuers, and accountants, to be settled by the Court.

S. 84. Power to lord chancellor to direct the payment of retiring pension to the accountant in bankruptcy, and the registrar or deputy registrars.

S. 85. Courts acting in the prosecution of fiats in bankruptcy to be auxiliary to each other for the proof of debts and examination of witness, and to have the same powers for these purposes as the Court to which the fiat is directed.

S. 86. Lord chancellor may authorize any commissioner, &c. of the Court in London to act for or in aid of any country commissioner or deputy registrar, and

vice versa; or any country commissioner or deputy registrar of one district to act in any other district.

S. 87. Travelling expenses, &c. of commissioners and deputy registrars to be paid out of "The Bankruptcy Fund Account," and the amount thereof to be in the discretion of the lord chancellor.

S. 88. Secretary of bankrupts to receive and account for a fee of 2s. 6d. for every certified copy of a declaration of insolvency.

S. 89. Fees set forth in schedule to be taken by the chief registrar.

S. 90. Fees set forth in schedule to be taken and accounted for in the country district Courts.

S. 91. Power to the lord chancellor to abolish or reduce fees.

S. 92. Returns to be made annually to parliament by accountant in bankruptcy and by official assignees.

S. 93. Interpretation clauses.

S. 94. Act may be amended or repealed this session.

CAP. 123.—An Act for amending, until the First Day of August, One thousand eight hundred and forty-five, and until the End of the then next Session of Parliament, the Law relating to private Lunatic Asylums in Ireland.

[12th August, 1842.]

EVENTS OF THE QUARTER.

On looking over our Abstracts of Statutes, it will be seen that, notwithstanding the time wasted in party politics during the last session, a great deal of effective legislation was got through. The most comprehensive measure is the Bankruptcy Bill, in which the best of the propositions contained in the Report of the Bankruptcy Commissioners have been carefully carried out. We understand that the new provincial courts, in particular, are deemed a great improvement on the old system by the whole mercantile community both in town and country. The filling up of these courts has necessarily occasioned an agitation amongst the bar, and neither the profession nor the public have any reason to complain of the manner in which the patronage has been exercised; the new commissioners being Serjeants Ludlow, Stephen and Goulburn; Messrs. Skirrow, Balguy, West, Jemmett, Ellison, Phillips, Daniell, Stevenson and Bere. The commissioners under the Lunacy Bill are Messrs. Barlow and Winslow, late secretaries to the Lord Chancellor.

A highly useful though more simple piece of legislation is the Attorney-General's Bill relating to double costs, notices of action, &c., and we recommend our readers to make themselves masters of its brief but well chosen provisions without delay.

Lord Denman's bill for removing the disqualification of interested witnesses has, contrary to expectation, not yet passed into a law.

The Copyright Bill has at length won its way into the statute book, but in a shape that must give little satisfaction to the originators. Seven years is a paltry boon at last. There is one provision of this statute which is likely to occasion much embarrassment to travellers: the section authorizing custom-house officers to seize all foreign reprints of English books imported "for sale or hire." This certainly does not authorize the seizure of a single copy in the possession of an ordinary traveller, but we understand the commissioners of customs have interpreted it as if it did.

A useful act for the consolidation of the law relating to attornies and solicitors, brought in by Lord Langdale towards the conclusion of the session, stands over till the next.

The Lord Chancellor and the Home Secretary are still from time to time attacked for appointing more Conservatives to the magistracy than Whigs. The plain answer is, that their predecessors had left them no alternative. In most of the towns and counties where the new appointments have attracted attention, it was only an act of bare justice to give the preference to men of undoubted respectability and fitness, who had hitherto been excluded for their politics.

Another legal periodical, published weekly, price threepence, has recently been commenced. It is entitled "The Law-Clerks' Magazine," is ably conducted, and speaks well for the cultivation of the class to which it is more particularly addressed.

The blue folio containing the evidence taken before the Committee appointed to consider the expediency of erecting a new set of courts in lieu of those at Westminster, is a curious and rather amusing document. The committee have made no report, but the evidence proves to demonstration that the existing accom-

modation is utterly insufficient either as regards bar, attorneys, public, witnesses, or jurymen. It is obvious, from the peculiar tone of the interrogatories, that certain members of the committee were opposed to the removal on the ground of its destroying associations connected with the Hall. This consideration is thus pressed upon Mr. Erle, whose opinions are undoubtedly entitled to the highest respect :

" Has it never occurred to you, especially in your earlier days, that the associations of Westminster Hall have something very attaching in them to students and young barristers?—A great deal of antiquarian interest, and interest of a totally different description from that which usually accompanies professional exertion.

" You think there is nothing which is likely to excite a man to energy and devotion to his profession, *and to a desire to emulate the great men who have adorned the profession of the law?*—I think professional exertion is wholly unconnected with antiquarian interest. I am not aware of any motive for professional exertion being derived from the historical associations attendant on Westminster Hall.

" *Chairman.*] Do you usually find the most successful barristers are men of the greatest taste?—If I wished well to a student at law, I should discourage the species of interest which has been alluded to."

The chairman (Sir T. Wilde) may rest assured that no man's success in life was ever impaired by taste, provided it were good taste; and with due deference to Mr. Erle, we submit that it is better to kindle than to kill enthusiasm. Do not grudge the embryo hero the Abbey, nor the budding chancellor the Hall. The prosaic side of the question will present itself soon enough without your aid, and depend upon it, students do not return to their Blackstone or Coke with less ardour, from having revelled awhile in the associations which you deprecate. On the contrary, the ardour of the best of them might flag at the outset if the precise nature of their future prospects could be unfolded to them. Had such notions been promulgated by practitioners of a different stamp, we should simply have replied in the words of Chief Justice Bushe: " These men depreciate the genius which they do not possess, and overrate the handicraft they are equal to. They would sheer a splendid profession of its beams, and cut it down to trade."

The question, moreover, was not what was most likely to prove profitable to the individual, but what was best adapted to keep up or elevate the profession as a class. On such a field we fearlessly oppose Dr. Johnson to both Sir Thomas Wilde and Mr. Erle: " To abstract the mind from all local emotion would be impossible, if it were endeavoured, and would be foolish if it were possible. Whatever withdraws us from the power of our senses: whatever makes the past, the distant, or the future predominate over the present, advances us in the dignity of thinking beings." On what other ground can national monuments of any kind be defended? We must take the liberty to add, as a matter of fact, that the highest order of advocates have usually been distinguished by taste, general accomplishment, and enthusiasm.

The Vice-Chancellor of England, the judge who has twice announced from the judgment-seat that the dealers in fiction in literature must necessarily deal in fiction in the ordinary concerns of life—which would make Shakespeare the greatest liar of any age—naturally enough disclaims romantic influence:

" Does your Honor, speaking from early recollection, think there is anything in the associations of Westminster Hall?—Not at all, not to my mind; I like to see

the building, but that is all ; but I had rather have a good comfortable court elsewhere, than one not so there.

“ Speaking of your early days ?—No, not to me, it has no influence on my mind.”

Very likely not—

“ A primrose on the mountain’s brim
A yellow primrose was to him,
And it was nothing more”—

In his Honor’s preference of a good comfortable court elsewhere, we perfectly concur: something, not every thing, should be sacrificed to the genius of the place, and the Hall itself will be left standing ; yet his peculiar mode of expression irresistibly reminds us of the colloquy between Tom Jones and Partridge, where, when Jones falls into raptures at the sight of the moon, Partridge remarks that the moon may be well enough, but, just at that particular moment, he should be better pleased at the sight of a roast sirloin of beef.

Notice to Correspondents.—The press of matter, particularly the length of the Digest and Abstract, compels us to postpone several subjects of importance.

Errata.—P. 273, l. 20, for *have*, read *has*.

P. 276, l. 26, for *banishments*, read *punishments*.

LIST OF NEW PUBLICATIONS.

An Elementary View of the Proceedings in Action at Law. By John William Smith, Esq. of the Inner Temple, Barrister at Law. Second Edition. In 12mo. Price 6s. boards.

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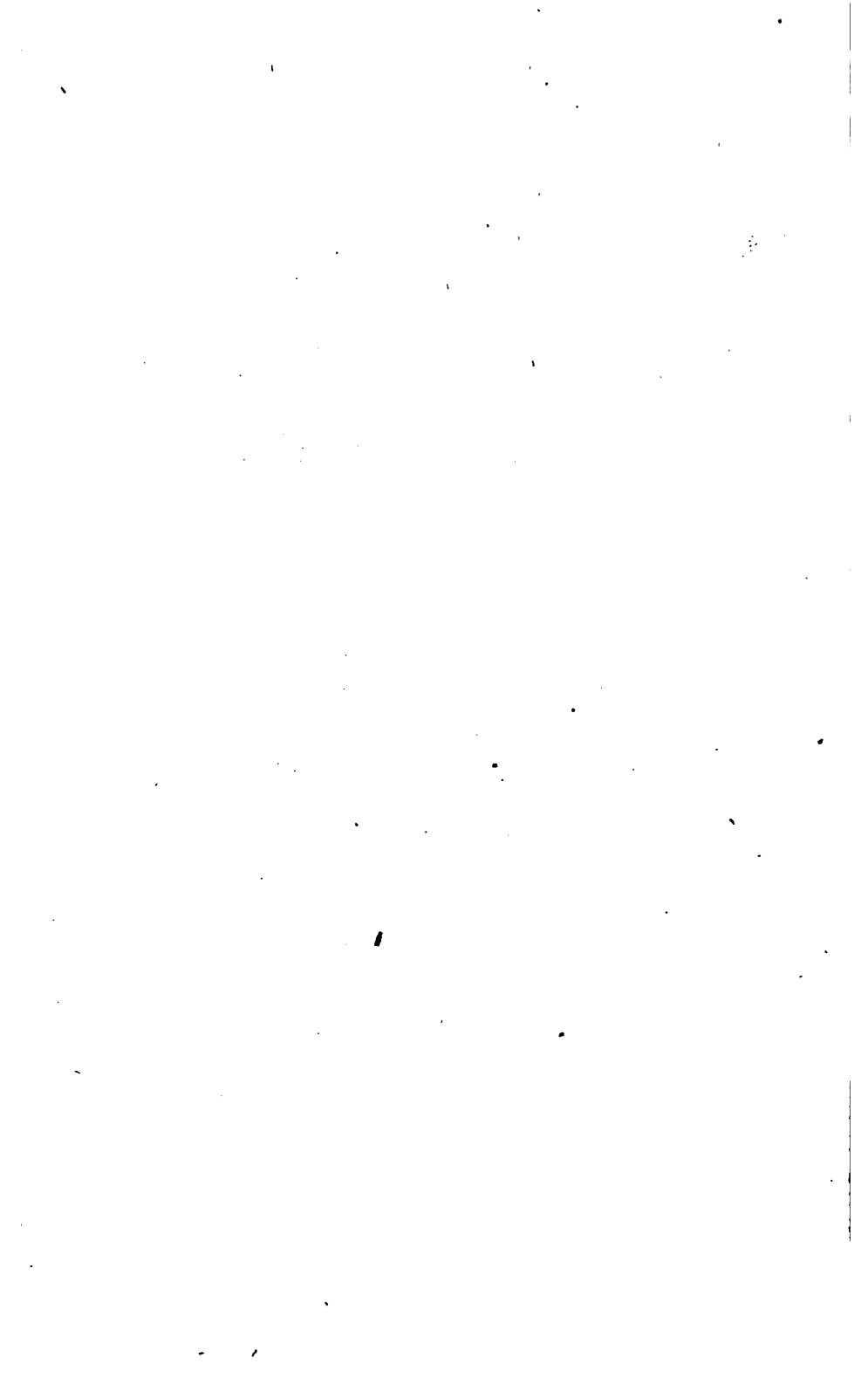
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